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CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS

HEARINGS BEFORE THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS CONGRESS OF THE UNITED STATES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND
DISCLOSING INFORMATION

WEDNESDAY, MARCH 21, TUESDAY, MARCH 27
AND WEDNESDAY, MARCH 28, 1973

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THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND DISCLOSING INFORMATION

WEDNESDAY, MARCH 21, 1973

U.S. CONGRESS,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C.

The Joint Committee met, pursuant to notice, at 10:10 o'clock in room S-407, the Capitol. Hon. Lee Metcalf [chairman] presiding.

Present for the Senate: Lee Metcalf, Montana; Mike Gravel, Alaska; Robert Taft, Jr., Ohio; and Lowell P. Weicker, Jr., Connecticut.

Present for the House: Jack Brooks, Texas; Robert N. Giaimo, Connecticut; James G. O'Hara, Michigan; James C. Cleveland, New Hampshire; and John Dellenback, Oregon.

Staff members present: Eugene F. Peters, executive director; Donald G. Tacheron, director of research; Raymond L. Gooch, staff counsel; and George Meader, staff counsel.

Chairman METCALF. The committee will be in order. As is usual, we will make a few opening statements.

We meet this morning to undertake an examination of the constitutional role assigned to the legislative branch—as one of three co-equal branches of the Federal Government—to look at how that role should be defined and how it should be carried out by members of the legislative body.

The task we have set for ourselves in this, the first hearing of the committee for the 93d Congress—and the first I have been privileged to chair—is a vital one, for the stakes are high for both Congress and the American people.

The interest of Congress in insuring representative government and the interest of the American people in strengthening the integrity and independence of their representation in the Congress are directly involved.

Article I of the Constitution vests "All legislative powers . . . in a Congress of the United States . . ." In section 6 of that article, it is provided that "for any Speech or Debate in either House, they [meaning the Senators and Representatives] shall not be questioned in any other place."

This language—the well-known speech or debate clause—is the constitutional basis for the historic legislative immunity doctrine. Its wording is derived from a similar provision in the English Bill of Rights of 1689, language by which Parliament won a violent battle for its independence from the Crown that had cost Charles I his head and forced James II into exile.

The adoption of the language by the Founding Fathers at the Constitutional Convention in Philadelphia in 1789 was in sharp

and tranquil contrast to the turbulent history in England. It came without debate or opposition.

Today, almost 200 years later, the speech or debate clause is as essential to the success of our continuing experiment in self-government as at the moment of its adoption. For it is this clause which reinforces the separation of powers, without which the democratic system of government would cease to function.

Legislative immunity is assumed by many to be a personal privilege or perquisite of office of individual Members of Congress, freeing them from being called to account for any indiscretion or misdeed.

Nothing could be further removed from the reality of the situation.

It's not what's in it for the Congress.

It's what's in it for the American people.

Their representation in the legislative branch of the Federal Government is solely dependent upon the legislators who make up that body. And, their freedom to act on behalf of their constituencies—without being subject to intimidation at the whim of an opposing or merely unfriendly executive or being called to account before a hostile judiciary—is what is assured by the immunity afforded legislators under the speech or debate clause.

That is what we will examine in the course of these hearings.

Individual legislators perform many various duties, in their official capacity. Recent court interpretations of the constitutional language of the clause have resulted in the categorizing of those duties as either “legislative” or “political” in nature.

Such interpretations serve the purpose of determining the jurisdiction of the courts over the activities of legislators; that is to say, if an activity of a Member is legislative in nature, no one in the executive has authority to raise and no court has jurisdiction to hear a question regarding that act or the motive for it.

However, if the activity in which the legislator engages is outside the scope of the court-adopted definition, that activity is, then, considered not to be legislative in nature and is subject to executive or judicial inquiry. If any allegations of improper motive or misconduct are raised during such an inquiry, the legislator must answer the charges of impropriety or account for that conduct.

The substance of the legislative immunity doctrine has been derived from this judicial interpretation of the constitutional language.

A legislator is immune from prosecution or accounting before another branch of Government for his legislative acts.

The courts have no jurisdiction and the executive has no authority to question them, for in questioning them they would be exercising legislative power. That is specifically denied them in the Constitution in accord with the separation of powers doctrine. “All legislative Powers,” that's all legislative powers, “shall be vested in a Congress of the United States.” The vesting of these powers is buttressed by the speech or debate clause embargo against questioning any exercise of the powers “in any other place,” that is outside the Halls of Congress.

As one and one are two, then, the narrower the definition or legislative acts is:

The broader is the jurisdiction of the Court;

The more intimidating is the will of the executive;

The more constricted is the independence of the legislator; and The less representative is the Congress of its constituency.

Today, the Congress is the recipient of the narrowest definition of what constitutes a legislative act that has ever been announced by the Supreme Court in the almost 200 year history of the speech or debate clause.

Mr. Justice White, writing for the majority of the Court last summer defined legislative acts as limited to those acts which are—

“... an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” (*Gravel v. United States*, 408 U.S. 606, 625 (1972))

The Court's definition of legislative activities is a far-reaching institutional challenge.

It threatens the way and the means by which we perform our representative-legislative role.

It threatens the effectiveness, integrity, and independence of our representation of our constituencies.

The Congress must have access to the information resources that are essential to our understanding the need for action and to our formulation of a reasoned response.

And, the Supreme Court, placing the lowest possible value on the free flow of information between Congress and the American people, has announced that you—the American people—and we—the Congress—must act at our peril to exchange information.

We cannot receive information from any person and insure the confidentiality of their identity.

We cannot disclose information to the public—in newsletters, speeches, or press releases—without risking the disfavor of the executive or being called to account before the judiciary.

As one commentator concluded, we are insulated from prosecution only when we are isolated from the people.

We don't intend to be content with sitting around talking to ourselves.

In the course of these hearings, we intend to look for answers to such questions as:

Which of the many acts a Member performs daily in the discharge of the duties of his office can be characterized as “legislative activities,” for which he is historically and constitutionally accountable only to his colleagues and the electorate he represents in the Congress?

What is the appropriate role of a legislator in carrying out his constitutional responsibility as the elected representative of the people?

Who shall determine the limits of that role for an individual legislator—the courts, the executive, or the Congress?

What distinguishes a “legislative” act from a “political” act, within the scope of a legislator's office—and is there a distinction?

I repeat, we are looking for the answers to these questions.

No one of us on this committee has yet decided what the outcome of these hearings should be. I assure you that no one of us will, until we have heard from all the witnesses who want to share their views with us.

One final point. We recognize that the broad interpretation of the speech or debate clause carries with it the responsibility for the Congress to keep its house in order.

The constitutional immunity of members for legislative actions does not free them from all liability. Our colleagues and our constituents have the authority and the obligation to call each of us to account—before the bar of the House and at the ballot box.

Chairman METCALF. Mr. Cleveland.

Representative CLEVELAND. Thank you, Mr. Chairman.

I, too, have a statement. I will not read the entire statement because I think we are all anxious to hear from you, Senator.

In my opening statement I do point out that at a time like this when the term "constitutional crisis" is being worked to exhaustion, involving the powers of the executive and the powers of Congress, as the distinguished Senator is very familiar, there is another branch of our Government which may be "tilting" a little bit, too. I speak of the judicial invasion of the legislative authority.

Of course, we are all familiar with some of the recent Court rulings in such matters as school prayer, abortion, pornography, and permissiveness in dealing with the criminal. I think it is significant that we also take a look at the proper functioning of Congress in that area as well as of the executive.

I point out in my opening statement that we act as a committee in no particular sympathy for the defendant in the cases that are prominently involved. As is so often true when matters of principle arise, one need not offer judgment on the conduct at issue to defend the principle. An analogy is the issue of free speech.

My concern echoes that of Senator Metcalf. It is for the legislature, not as a person but in its legislative capacity and legislative community, not personal. It does not mean that we as legislators can act against the law. It simply means that in our legislative function we are entitled, under the Constitution, to certain protections, and it is important that these be abided by.

I also call attention in my opening statement to the parallel of these hearings to the legislative attempt that many of us have joined in to enact "shield" laws for newsmen. I think there is a striking analogy between the legislative attempt to protect newsmen in their proper function just as I think the legislator should be also protected.

If the rest of my statement can go in the record, I would appreciate it.

[The statement follows:]

STATEMENT OF CONGRESSMAN JAMES C. CLEVELAND OF NEW HAMPSHIRE: LEGISLATIVE IMMUNITY IN SPEECH AND DEBATE, THE ROLE OF THE CONGRESSMAN: BEFORE THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, MARCH 21, 1973

Mr. Chairman and fellow members of the Joint Committee, we convene these hearings today at a time when the term "constitutional crisis" is being worked to exhaustion over executive impoundment of funds appropriated by the Congress. But another branch of government may be "tilting". Judicial invasions of legislative authority characterized by Court rulings in such matters as school prayer, abortion, pornography and permissiveness in dealing with the criminal, may well contain more profound and lasting implications for the conduct of governmental affairs under our system of separating power. Certainly this is indicated by the single issue we deal with here today, as is clear from the documentary materials we have reviewed in advance of these hearings.

We confront no less than a major assault by the judicial branch, ruling on actions brought by the executive branch, on our ability to perform the functions entrusted to us by the electorate. Taken together, the Supreme Court's rulings in *United States v. Brewster* and *Gravel v. United States* strip the Constitutional protection of the Speech or Debate Clause from many of the fundamental functions we perform, including that of informing our constituents of matters of public policy. We cannot let those decisions stand. If there be any truth to the assertion that Congressional power has more atrophied than been arrogated by the Administration, let that not be the case here. I am, therefore, pleased to join in this effort to build the case for a bill to define and elaborate the genuine meaning of the representative function and provide the proper safeguards.

At the outset, I wish to emphasize certain points for the record:

1. I act out of no sympathy for the defendant in either of these cases. As is often true when matters of principle arise, one need not offer judgment on the conduct at issue to defend that principle. An analogy is the issue of free speech, however repugnant the views spoken. My concern is that the Supreme Court has seized with a vengeance on the actions of two members and rendered decisions setting shockingly broad precedents defining for us our role as Members of Congress.

2. My concern is not for the legislator himself. Senator Metcalf has rightly stated that legislative immunity is not the personal perquisite of the legislator. Among the precedents we have reviewed, I could not agree more with an earlier Court ruling that, "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

I see striking parallels here between our attempt to give legislative expression to the Speech or Debate Clause and the newsmen's privilege bill I co-sponsored to elaborate First Amendment rights. In my statement to the House Judiciary Committee holding hearings on that matter, I stated:

"My concern is for the public's right to the free flow of information, rather than privileged status of the individual newsmen."

3. Finally, I seek no broader immunity than had traditionally been assumed to prevail under the Speech or Debate Clause before the Court set out on a course devoid of legislative landmarks. I have no wish to protect myself or my colleagues from the consequences of wrongdoing. What I do seek is recognition that there are some actions clearly liable to prosecution, others clearly protected by what immunity remains after the Court decisions in *Brewster* and *Gravel*, and a third area subject to dispute. It is with regard to this latter category that the dispute must be resolved in favor of Congressional prerogatives.

This determination requires not a broadening of the concept of immunity but a realistic recognition of what the job of the Member of Congress is now and historically has been. The elements of this function should be gauged against the statement of the Court in *Brewster*:

"It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called 'newsletters' to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause."

This is an utterly astounding assertion, suggesting that the Court labors in abysmal ignorance of the real processes of representative government. Members of Congress do not inhabit the same circumscribed environment as the chambers of the Justices. The legislative life of the Representative is an inseparable whole.

Consider the services performed in behalf of constituents, which the Court dismisses as "errands." With the proliferation of government agencies, policies, programs, projects, rules, regulations and guidelines, the individual citizen confronting the government does not have a prayer without a roadmap. With fragmentation of programs, turnover in agency personnel, red tape, buck-passing and apathy, continuing Congressional interest is essential to make the system work at

all. Bureaucratic machinery, like the heating system in an aging apartment, responds to judicious application of a hammer.

Requests for information may be the only action needed to spur a lagging agency into action. The knowledge that the response may be made public also helps.

The broader information function, the newsletters, news releases and speeches, delivered in Congress or outside, all contribute to the maintenance of government based on the informed consent of the governed. Given the concentration of the press on the dramatic, the controversial, and graphic, these means are essential to the exercise of leadership in building consensus for constructive change.

Newsletters, questionnaires and like communications are invaluable in fostering communications between the Member and the mass constituency, and often generate further exchanges of a factual information and opinion. To dismiss them as self-serving propaganda is to denigrate the intelligence of the electorate.

The process of government has become so expanded, and administration so complex, as to give rise to recommendations for an ombudsman. This I have resisted as a deterrent to direct communication between the Representative and those he represents, which produces the raw material for the legislative process. Frequently Members will testify or submit statements before legislative committees of which they are not members based on the experiences of constituents out where the real problems are.

Equally important is access to government information, generated by public servants at public expense, and its dissemination to the public, one issue in the *Gravel* case.

This should not be obstructed by concern that the legislator is to be questioned for his actions in this regard or required to disclose the source of the information. In an era of expanding executive assertion of privilege, Congress is often dependent on other than officially released material. This can be a particular problem for the minority party when the majority party controls the executive branch as well as the Congress. Concern for the ability of the Congress, majority and minority, to function intelligently on the basis of adequate information has inspired my ten-year campaign to obtain equitable staffing for the minority on Congressional committees.

Yet the Court found in *Gravel* that the acquisition of information in preparation for a legislative hearing and the publication of the hearing can lie outside the protection of Congressional immunity. I find the following language from the ruling deeply disturbing:

"Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

This, I submit, unduly restricts the flow of information on which policy positions ultimately relating to legislation are developed.

Significantly, the ruling in effect confers a sanctity upon the judgment of the anonymous administration appointee in matters of release of information denied to elected representatives of the people. At a time of expanded executive privilege, as in the reluctance of the Administration to furnish witnesses in connection with Senatorial confirmation hearings or to subject the director of the Office of Management and Budget to the confirmation process, it is no time to erode protection of Members of Congress based on traditional interpretation of Constitutional language.

As in the case of newsmen's privilege, I seek no absolute protection for Members. We are subject to the verdict of the electorate as to our legislative behavior, and subject to that of our peers as well. We are subject to prosecution for activities unrelated to our performance of Congressional duties, and subject to scrutiny of the press.

The Court in *Brenster* spoke of some "disinclination and limitations of each House to police these matters." I would observe that this has been more true in the past than today, and fails to give recognition to our moves to require financial disclosure by Members and key staff, our expulsion of a former committee chairman and establishment of a mechanism to strengthen standards of conduct.

I also would point out that some extracurricular activities of members of the Court have enjoyed a measure of protection from the cumbersome machinery available to the Congress in this regard.

As we shape the legislative approach I advocate, we must recognize that the potential for abuse remains, as in the case of all freedoms. A hallmark of our society has been the fact that we have opted for freedom in explicit recognition of the dangers of abuse. Let us enact a realistic immunity statute, but not stop there. Specific forms of abuse can be curbed by specific measures, as for example reporting requirements for campaign expenditures, limitations on dollar amounts, and encouragement of small donations through the tax credit and tax deduction provisions of the Internal Revenue statutes.

But if the Congress is to merit public support in its claim to immunity, it must also display a continuing willingness to scrutinize the behavior of its own members.

Chairman METCALF. Mr. Brooks.

Representative BROOKS. I would like also to make a short statement.

Mr. Chairman, I want to associate myself with the comments that you made in your statement. You have put down the foundation on which we can set out to build a solid hearing record.

I want to commend, as well, the leadership you have shown in calling these hearings on this critical constitutional issue of interest to every Member of Congress and to their constituencies.

The joint committee is a most appropriate forum for the consideration and definition of the legislative role of congressional representatives.

During the 92d Congress the committee, which I was honored to serve as its first chairman, began work to carry out these statutory mandates. Congress and its Members, officers, and employees, are being called into court often to defend their official actions by an increasing number of legal complaints filed against them, some well intentioned; others merely of a nuisance variety.

Members of Congress and their aides, frustrated by their inability to obtain specific identified information or action from the executive departments and agencies, have sought it by means of legal action.

The most troubling of these legal battles and courtroom confrontations have involved questions of the scope of legislative immunity, as determined by the courts' interpretation of what are the legislative functions of congressional office.

We are concerned with recent interpretations of legislative immunity by the Supreme Court, interpretations so restrictive as to almost make a mockery of the intent of the constitutional language, defining separation of powers and enforcing that separation for the legislative branch.

We are concerned also with the isolation of Congress from all other sources of information other than those available through the official channels established by the executive branch. In today's world, the Congress cannot realistically do its job if it must depend on information garnered from public information officers and tightlipped press secretaries.

We are equally concerned with determinations by the court that we are performing no official legislative function when we try to share information about the operation of the Federal Government with the American people.

If I am acting at my peril everytime I send a news release to my congressional district or give an interview or make a speech in Beau-

mont, Tex., on a matter of concern in the Congress, then wisdom might dictate that I not share that information.

If, before I speak outside the Halls of Congress, I must first consider whether I may offend someone in the executive branch who may prefer that the public not know how he is botching up his job, or that I may be called to account before a judicial body of inquiry, is it not the better role for me not to say anything?

But what happens then to my representative responsibility to keep my constituents informed about their Government?

These concerns bring us here this morning. We are considering what the response of the Congress should be to this challenge from our coequal partners in Government which threatens to cut off the Congress from the American people in the exchange of information.

Thank you, Mr. Chairman. I shall extend my remarks in a little further detail.

Chairman METCALF. Without objection, it is so ordered.

[The statement follows:]

OPENING STATEMENT OF REP. JACK BROOKS (D-TEX.), VICE CHAIRMAN, JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, AT HEARINGS ON THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND DISCLOSING INFORMATION, WEDNESDAY, MARCH 21, 1973

Mr. Chairman, I want to associate myself with the comments you have made in your statement. You have ably put down the foundation on which we can set out to build a solid hearing record.

I want to commend, as well, the leadership you have shown in calling these hearings on this critical constitutional issue, of interest to every Member of Congress and to their constituencies.

The Joint Committee is a most appropriate forum for the consideration of the definition of the legislative role of congressional representatives.

The Legislative Reorganization Act of 1970 established the Joint Committee on Congressional Operations and directed it to "study . . . the organization and operation of the Congress . . . and . . . recommend improvements . . . with a view toward strengthening Congress . . . [and] improving its relationships with other branches of the United States Government . . ."

The Joint Committee was also directed to "identify any court proceeding or action . . . of vital interest to the Congress . . . as a constitutionally established institution of the Federal Government . . ."

During the 92nd Congress, the committee—which I was honored to serve as its first chairman—began work to carry out these statutory mandates.

We initiated a series of cumulative reports to both houses of the Congress in October, 1971, containing case briefs and the current status of court actions identified by the committee. Six such reports were issued during the 92nd Congress, identifying more than 60 court actions involving Members of Congress or Congress as an institution. In addition, two special reports were prepared on issues of general interest which had become the subject of significant controversy in the courts.

This identification and reporting activity of the committee carried with it a number of lessons. Most significantly, we were made aware that the courtroom has become the arena today, in too many instances, for the airing and settling of disputes about what are essentially legislative matters.

The Congress, its Members, officers and employees are being called into court to defend their official actions by an increasing number of legal complaints filed against them—some well-intentioned and others merely of a nuisance variety.

And, Members of Congress and their aides, frustrated by their inability to obtain specifically identified information or action from executive departments and agencies have sought it by means of legal actions.

The most troubling of these legal battles and courtroom confrontations have involved questions of the scope of legislative immunity, as determined by the courts' interpretations of what are the legislative functions of congressional office.

As the Chairman stated in his opening remarks, we do not quibble with the courts' exercise of jurisdiction to define the scope of Speech or Debate Clause immunity by interpreting what is to be considered "speech or debate."

However, we are not bound to agree when the court so narrowly interprets the clause as to exclude from the immunity it affords, important and substantial functions of the representative role of a Member of Congress. It can be argued that such action by the court is a seizure of jurisdiction and an invasion of the territory of the legislative body. When that happens, the court is exercising legislative power. They have no business doing that—practically or constitutionally.

We are concerned with recent interpretations of legislative immunity by the Supreme Court, interpretations so restrictive as to almost make a mockery of the intent of the constitutional language, defining separation of powers and enforcing that separation for the legislative branch.

We are concerned, also, with the isolation of the Congress from all sources of information, other than those available through official channels established by the executive branch. In today's world, the Congress cannot realistically do its job if it must be dependent on information garnered from public information officers and tight-lipped press secretaries.

We are equally concerned with the determinations by the court that we are performing no official legislative function, when we try to share information about the operations of the Federal government with the American people.

If I am acting at my peril every time I send a news release to my congressional district or give an interview or make a speech in Beaumont, Texas—on a matter of concern in the Congress—then wisdom might dictate that I not share that information.

If, before I speak outside the halls of Congress, I must first consider whether I may offend someone in the executive branch—who may prefer that the public not know how he is botching up his job—or that I may be called to account before a judicial body of inquiry, is not the better role for me not to say anything?

But, what happens then to my representative responsibility to keep my constituents informed about their government?

These concerns bring us here this morning. We are considering what the response of the Congress should be to this challenge from our coequal partners in government, which threatens to cut off the Congress from the American people in the exchange of information.

Thank you, Mr. Chairman.

Chairman METCALF. Senator Taft.

Senator TAFT. I shall not make any prepared statement.

I think it important to point out at this time, in getting into these hearings, that the interest involved in both the executive privilege and the legislative privilege to the extent it any longer exists after the *Gravel* case, and in the privileges of newsmen alike, is a public interest. It is not a sacrosanct position of the particular bodies or particular professions that are involved. The purpose is to bring about a free flow of information among the men who have the responsibility for acting upon legislative matters, for carrying out the laws under the executive direction of the Constitution, and for carrying out the constitutional protections of freedom of the press and freedom of information in the case of the newspaper media professions.

I think it important that we not lose sight of this basic objective and not find ourselves talking about trying to protect the legislative position or protect the executive position or protect the position of newsmen as such. Our goal and purpose must be to protect the public as we have traditionally in America by creating the freest flow of information possible to those responsible for action.

Chairman METCALF. Thank you very much. Mr. Giaimo.

Representative GIAIMO. I will not take the time of the committee at this point, but I do ask unanimous consent to include a statement in the record at a later time.

Chairman METCALF. We will all be permitted to extend our remarks.

Chairman METCALF. Mr. Dellenback.

Representative DELLENBACK. I will make one brief statement before we get to the witnesses who are to appear this morning.

As we start these inquiries, in my mind I am not prepared to equate the first amendment to the Constitution with article I, section 6. While there are similarities, as my colleague from Ohio has pointed out, we are talking about a different section of the Constitution, and I am not prepared to equate our responsibility and what ought to take place under the speech and debate clause with what necessarily follows under the first amendment. They are both pertinent, but I think the similarities ought to be kept in mind and the dissimilarities ought to be kept in mind.

Chairman METCALF. Thank you, Mr. Dellenback. Senator Gravel.

Senator GRAVEL. I would like to say briefly that information is the very sustenance of a free people attempting self-government. The flow of information has been impaired by judicial action against the press and against our own legislative body. There also has been an overextended use of executive privilege by the present Executive and recent past Executives.

For that very simple reason, I think these hearings and the attention given the subject by this committee are one of the most important activities of this Congress.

Chairman METCALF. Thank you very much.

All members will have an opportunity to extend their remarks at the beginning of these hearings.

Now for the first witness we have the honor to have one of the most distinguished constitutional lawyers who ever has served in the Senate of the United States.

I say that, Senator Ervin, because I serve in that line that emanated from Senator Thomas J. Walsh, who was a leader in his time in matters of constitutional privilege in Montana.

We are confronted here with the strange and peculiar situation in which there is not anything in the Constitution about immunity for members of the court, and yet they have invented it and have continued to grow in their immunity, and now they are circumscribing the precise and stated immunity of the legislative body.

I do not think of anybody who is more qualified and more fitted to start off these hearings on this historic confrontation that we are going to have with the executive and judicial bodies than you, Senator Ervin. We are delighted to have you here this morning. We welcome you with your experience, and your skill, and your long knowledge of the Constitution. We are looking forward to your testimony.

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator ERVIN. Mr. Chairman, I am deeply grateful to you for your remarks concerning myself.

I want to commend the Joint Committee on Congressional Operations for its initiative in scheduling these hearings. The statements made by members of the Joint Committee indicate that the Joint Committee is acutely aware of the problems involved. Americans of every ideological persuasion are greatly concerned that the principle of separation of powers, one of the fundamental doctrines incorporated in our Constitution, is on its deathbed. The search for a cure has become absolutely essential if the form of government established under our Constitution is to be preserved. I am confident that this committee's hearings will underline the imbalance of power that presently exists among the branches of the Federal Government and point us toward some remedies to this imbalance.

While there are many important issues currently associated with the principle of separation of powers—including such matters as Executive impoundment of appropriated funds, sweeping Presidential assertions as to the scope of executive privilege, and the troublesome relationship between Congress and the President in the conduct of foreign affairs—I want to concentrate today upon the issues in conflict with respect to the “speech or debate” clause of article I, section 6 of the Constitution. This clause is a vital part of the doctrine of separation of powers inasmuch as it protects Members of Congress from intimidation by the executive and judiciary through the use of judicial inquiry into legislative activity.

During its last term the Supreme Court decided two cases, *United States v. Gravel*, 408 U.S. 606 (1972), and *United States v. Brewster*, 408 U.S. 501 (1972), in which the Court set forth its interpretation of this clause. In my opinion, these decisions pose a dangerous threat to the independence and integrity of the legislative branch.

The Senate was properly alarmed about the threat to its independence posed by the judicial inquiry into the activities of Senator Mike Gravel. After the Supreme Court agreed to hear the case, the Senate on March 23, 1972, adopted S. Res. 280 authorizing the filing of an amicus curiae brief with the Court on its behalf. The Senate realized that the Supreme Court would interpret the “speech or debate” clause and, in the words of the resolution, feared that the Court thereby might “impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole.”

The Senate's fears were well-founded, for on June 29, 1972, the Supreme Court did just that. In handing down its decisions in *United States v. Gravel* and *United States v. Brewster*, which also involved an interpretation of the “speech or debate” clause, the Court set forth significant restrictions as to the scope of the protection provided Members of Congress by the clause.

In these two cases the new majority on the Court tinkered with the very heart of the constitutional doctrine of separation of powers. These decisions impair the constitutional independence and prerogatives of every individual Senator and of the Senate as a whole to a degree none of us anticipated when the resolution was adopted.

The same observation applies to the House of Representatives as a whole.

These two Supreme Court decisions have so restricted the immunity given to Members of Congress by the “speech or debate” clause that they can no longer independently acquire information respecting

activities of the executive branch nor inform their constituents of their findings without risking criminal prosecution. Indeed, these decisions raise the clear danger that a Member's speech or vote on the floor may subject him to inquiry by the executive or judicial branch.

The framers of the Constitution wrote the "speech or debate" clause to remedy a very specific evil. Fresh in their minds was the history of harassment by English kings and their judges of Members of Parliament who spoke out in the course of their legislative activities in a manner embarrassing to the Crown. The legislative immunity incorporated in our Constitution is a product of that turbulent period in English history marked by the glorious revolution and the beheading of Charles I. Indeed, one reason Charles I lost his head was his imprisonment of Members of Parliament who opposed his overseas military campaigns.

Justice Frankfurter related the history and origins of legislative immunity to the "speech or debate" clause in his excellent opinion in the case of *Tenney v. Brandhove*, 341 U.S. 367, 372 (1971) :

In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speech in Parliament. . . . In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debate or proceeding in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary Sess. 2, Ch. 2.

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. . . .

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896). 38.

Until these decisions by the present activist majority, the Supreme Court relied heavily upon this history to derive the meaning of the clause. When I refer to a court as "activist," I mean a court which ignores the history or policy or settled precedents underlying a particular clause of the Constitution or statute. The Supreme Court can be labeled "activist" whether it is popularly considered "liberal," as was the Warren Court, or as "conservative." The vice is the same whatever the ideology—placing the Court itself above the Constitution. It is not interpreting and applying, but rewriting.

An unfortunate example of an activist court at work is also found in the majority opinion in *United States v. Brewster*, written by Chief Justice Burger who was joined by Justices Stewart, Marshall, Blackmun, Powell, and Rehnquist. There the majority concluded that the English history which gave rise to article I, section 6 of the Constitution was no longer dispositive in interpreting the "speech or debate" clause. It was satisfied that—

Our history does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England.

The Court has conveniently forgotten much about American history. During the infamous "alien-sedition" period, the Federalist ad-

ministration used the judiciary to intimidate anti-Federalist Congressmen. For example, in 1798, Congressman Matthew Lyon was convicted and sentenced before a biased Federalist judge who was motivated by purely partisan political considerations. The judge would not even allow Lyon time to prepare his defense. In 1797 a grand jury, under the supervision of another Federalist judge, conducted an inquisition of an anti-Federalist Congressman for "sedition" in sending a newsletter to his constituents critical of the administration's war policy. Thomas Jefferson considered the grand jury's action to be a blatant violation of the "speech or debate" clause and suggested that the grand jurors should be arrested and imprisoned for this "great crime wicked in its purpose, and mortal in its consequences."

Of course, even if the Court were correct about its American history, its conclusions would be of little comfort. My fears would not be allayed by the knowledge that until now most Presidents have exercised great restraint in hauling legislators they do not like into court. Effective separation of powers between branches of government must rest not only upon good faith and great expectations, but also on the firm bedrock of constitutional principles.

The Constitution provides two methods by which Congressmen can be held accountable for their misdeeds. They can be disciplined by the body of which they are a member and they can be disciplined by the electorate at the next election. These means of holding Congressmen accountable for misbehavior do not compromise the independence of the legislative branch.

Apparently, the Supreme Court's majority in the *Brewster* case was not satisfied with what the Founding Fathers provided for in this respect. This majority ignored the explicit words and policy of the Constitution in favor of what it believed to be a better procedure for dealing with alleged misdeeds by Members of Congress. In so doing, the Court's majority in *United States v. Brewster* ran roughshod over the "speech or debate" clause.

Earlier Courts, concerned about the independence of Congress, have felt it necessary to give the clause the broadest possible interpretation. Chief Justice Burger, in his majority opinion in *United States v. Brewster*, dismissed these prior judicial expressions. He wrote that, "the contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by the courts, not on the precise words used in any prior case, and surely not on the sense of those earlier cases, fairly read." He thus rationalized away the important policies and principles underlying the clause which have been recognized by all Supreme Courts until this one by the simple and unconvincing device of labeling the Court's past precedents as mere rhetoric and sweeping language.

The *Brewster* case involved the alleged solicitation and acceptance of a bribe by former U.S. Senator Daniel B. Brewster, of Maryland. A 1969 indictment charged that Senator Brewster as a member of the Senate Post Office and Civil Service Committee had been influenced in his actions on legislation proposing changes in postal rates as the result of an alleged \$24,000 bribe from the mail-order company of Spiegel Inc. The district judge dismissed the indictment against the former Senator on the ground that he was immune from prosecution under the "speech or debate" clause. The Supreme Court reversed by

simply concluding the bribery could be proved without relying on the evidence of what the Court defined as protected activity—the actual vote on the postal rates.

The *Gravel* case involved Senator Mike Gravel's reading of the "Pentagon Papers" at a meeting of the Senate Public Works Subcommittee on Public Buildings and Grounds and the inclusion of the documents into the subcommittee record. The case arose out of the attempt by a Federal grand jury in Boston to inquire into the matters relating to the public disclosure of the papers, and its subpoena of an aide to the Senator. Senator Gravel moved to intervene in the aide's motion to quash the subpoena—asserting immunity under the "speech or debate" clause on behalf of the aide.

Although the Senator failed to quash the subpoenas against this aide, the lower Federal courts granted a protective order precluding questioning of the Senator or any member of his staff about the subcommittee meeting, including the acquisition and subsequent publication by Beacon Press of the papers and the proceedings before the subcommittee. The Court of Appeals based its order on its conclusion that the aide and Senator Gravel enjoy similar immunities under the clause and on a common law privilege akin to that accorded executive and judicial officials to protect them from liability for official conduct.

There were several different issues before the Court in each of these two cases. However, the fundamental question facing the Court in both cases was the same, a question of jurisdiction—whether inquiry into certain behavior of Members of Congress could be conducted by the executive and judicial branches or whether the separation of powers concept and the "speech or debate" clause require that the inquiry remain the exclusive responsibility of the legislative branch.

The general question of what activity is protected by the "speech or debate" clause and, therefore, is within the exclusive jurisdiction of Congress, took three forms in these cases.

First, in the *Gravel* case, the Court decided whether aides to Members of Congress enjoy the same immunity under the clause as Members themselves.

Second, in *Gravel* and to a certain extent in *Brewster*, the Court determined what was "legislative activity" and thereby protected by the clause. More precisely, the Court determined whether a Member was engaged in legislative activity when he acquired information on the activities of the executive and informed his constituents of his findings.

Finally, in *Brewster* the Court was concerned with the extent to which a Federal court could indirectly question a Senator on concededly protected activity—the casting of a vote—without violating the clause.

The Court decided the first issue—whether aides enjoyed the same immunity as their legislator employers—in the affirmative. It concluded that the immunity of an aide is identical to that of the Senator. In the Court's words the clause provides immunity to the aide, "where his conduct would be a protected legislative act if performed by the Member himself."

Unfortunately, this determination by the Court is of little significance because what the Court gave with one hand it more than took away with the other. While the Court concluded that an aide enjoys

immunity equal to that of his Senator, it so restricted the immunity enjoyed by the Senator as to make it largely worthless to the Senator or his aide. It decided, in the *Gravel* case, that the acquisition of information in preparation for a legislative hearing and the publication of the hearing thereafter are not protected activities. And, in *Brewster*, it held that even a protected activity such as voting is still subject to inquiry by the Court or the executive branch.

Under the Supreme Court's view, no activity is protected except the narrowly defined casting of a vote or the giving of a speech before the House or in committee. No preparatory acts leading up to a protected activity would be immune under the clause. A Senator would not be protected when he obtains information for use in a speech or a hearing or when he attempts to bring the result of his legislative activity or that of the whole body to the attention of the public. Further, even the narrow range of activity still protected after these decisions—voting and speaking on the floor—is subject to question if the executive or the judiciary can find a possibility of an illegal act. So, in effect, not even voting and official speaking are any longer covered by the clause.

In *Gravel* the Court excluded acquisition and republication from the protection of the "speech or debate" clause because these matters did not fall within its new artificial definition of "legislative activity." According to the Court, the only activity which is "legislative" and therefore entitled to protection is that which is—

An integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

In other words, five of the Justices of the Supreme Court, none of whom has spent any time in Congress, have concluded that the acquisition of information for hearings and the communication of the results of hearings to the public are not "integral" parts of the legislative process.

This definition of "legislative activity" reflects a lack of appreciation of the things essential to the legislative process. As we all know, the formulation, consideration and passage of legislation involves much more than the introduction of a bill, a few speeches and a vote. The *Washington Post*, in an editorial critical of this decision, on July 15, 1972, made this point quite forcefully:

This decision is extremely troubling because it declares, in effect, that the only communications essential to the legislative process are those among congressmen. This relegates to a lesser realm the constant, churning traffic in ideas and opinions between congressmen and citizens. Yet this communication is central to the idea and functioning of representative government, not peripheral as the court seems to think.

To my mind, Chief Justice Parsons had a much more realistic view of the legislative process when he defined the scope of legislative activity in the case of *Coffin v. Coffin*, 4 Mass. 1, 27 (1808):

... for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules.

According to Chief Justice Parsons, "legislative activity" is what we as Members of Congress do as representatives of our constituents. If we feel that we are representing our constituents by investigating

the executive branch's conduct of a foreign war, as anti-Federalist Congressmen did during Federalist administrations in the late 1700's, that is legislative activity and beyond inquiry in a Federal court. If we want to inform our constituents of the findings of our investigations, that is also legislative activity and beyond inquiry by a Federal court. Of course, we are not unaccountable in the performance of these legislative activities. Our constituents can vote us out of office if they decide that any of our activities do not represent their interests. And the Senate can establish rules and penalize us for activity it deems inappropriate. The same thing applies to the House. But the Supreme Court can contrive no definition which will convince me that it is appropriate for any Federal court or grand jury to inquire into such legislative activity as obtaining information about the functioning of the executive branch and informing the public of the actions of its Government.

What I have just stated has been the unquestioned law of this land for almost two centuries. Indeed, the Supreme Court has frequently relied on Justice Parson's formulation [e.g., *Kilbourn v. Thompson*, 103 U.S. 168 (1880)].

There is very disturbing language in these opinions, language which illustrates a lack of appreciation of what is essential to the legislative function. Although the *Brewster* decision does not turn on what is and what is not legislative activity, the majority felt compelled to expound on the subject. Despite the fact that it is all dicta, the Court's reasoning reveals its attitude toward Congress and perhaps explains the real reason why the Court stripped Congress of immunity for acquisition and publication in *Gravel*.

In *Brewster*, the Court expressed its view that Congress is incapable of disciplining its own Members in a wise manner and that Congress could not provide all the protections that a Federal court could in disciplining misbehavior.

But, to my mind, the most serious affront to this body occurred in the Court's distinction in *Brewster* between protected and nonprotected activity. The Court drew a distinction between what it determined to be "political" activity and "legislative" activity. The majority would not protect what it labels as "political" activity or "errands" performed by Congressmen:

These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. . . . They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections.

In essence, the majority believes that those activities we do on behalf of our constituents are for our own personal advancement, that is, for increasing our chances of reelection. It regards them as "political" and therefore not entitled to protection. It demeans many legitimate acts we perform in our representative capacity or as ombudsmen between the people and their government by labeling them as "errands" and assuming that they are performed for base political reasons.

As disturbed as I am about the ruling in *Gravel* and dicta in *Brewster* stripping immunity from acquisition and republication, I

fear that the Court may have sounded the death knell for the "speech or debate" clause in its holding in *Brewster* permitting indirect inquiry into the motives for a Member's actual speech or vote on the floor or in committee. The Court in *Brewster* split over whether inquiry into a nonlegislative act (bribery in this case) could be conducted without indirectly bringing into question a legislative act—the casting of a vote in committee or on the floor. Justice White, who wrote the majority opinion in *Gravel*, thought that inquiry into the former was for all practical purposes an inquiry into the latter and filed a vigorous dissent in *Brewster*.

In writing the majority opinion in *Brewster*, Chief Justice Burger was faced with Justice Harlan's fine opinion in the case of *United States v. Johnson*, 383 U.S. 169, a 1966 case with facts almost identical to *Brewster*. In that case the Court frustrated a prosecution of a Congressman for giving a speech in return for a bribe, while in *Brewster* the prosecution was for the casting of a vote in return for a bribe. Justice Burger distinguished the cases by concluding that the Johnson Court would have been satisfied if the Government had proven the bribe and a promise to give a speech without offering the speech as evidence of the bribe. Therefore, the Chief Justice reasoned, the prosecution in *Brewster* could proceed if the Government would offer only the promise to vote and not the vote itself. Ironically, almost the same argument was offered by the Justice Department in the *Johnson* case and was explicitly rejected by Justice Harlan.

In Justice White's view, an inquiry into the bribery would of necessity touch upon matters which are, beyond question, within the scope of the privilege—that is, the vote itself and the Senator's motives in casting the vote. In the Justice's own words:

Insofar as it charged crimes under 18 U.S.C. § 201(c) (1), the indictment fares little better. That section requires proof of a corrupt arrangement for the receipt of money and also proof that the arrangement was in return for the defendant "being influenced in his performance of any official act . . .". Whatever the official act may prove to be, the Government cannot prove its case without calling into question the motives of the Member in performing that act, for it must prove that the Member undertook for money to be influenced in that performance.

Justice White recognized the Chief Justice's logic for what it was—mechanistic and artificial—a logic which fails to recognize the fundamental principle underlying the "speech or debate" clause.

We could look upon these decisions fatalistically. We might resign ourselves to the view that the unbridled expansion of executive privilege and the withering of legislative privilege are part of an inevitable trend of aggrandizement of power in the Presidency evidenced throughout American history. But if we do so, we profane our oaths to uphold the Constitution and indeed we may preside over the funeral of our system of government.

If we do not respond rationally and firmly to the constitutional crisis wrought by these decisions, the doctrine of separation of powers may die a quiet and ignoble death. The Congress may find itself in the same situation as Parliament found itself under the reign of Charles I. That crisis led to revolution in 1640 and a total restructuring of the English system of government. Continued inaction on our part may lead to consequences no less grave for our constitutional system. As Woodrow Wilson once warned, warfare between branches would be fatal to the continuation of democratic government.

In an effort to obviate the harmful effects of these decisions, I have prepared a bill.

This proposed legislation would preclude direct or indirect inquiry of a Member of Congress or his aide by a court or grand jury into a Member's legislative activity. "Protected legislative activity" is broadly defined to include all activities related to the responsibility of Congress to oversee the executive branch, as well as those activities involved in informing the public of its findings. However, congressional immunity applies only to criminal proceedings and does not extend to libelous statements or unconstitutional acts by Members which injure the general public.

Practically, this legislation would empower a Member of Congress to invoke this privilege on behalf of himself or an aide in any criminal proceeding, and thereby automatically stay any subpoena which would require that Member or his aide to testify regarding "protected legislative activity." As well, all subpoenas issued to Members of Congress must be personally authorized by the Attorney General, who must notify the Member, the Speaker of the House, and the President pro tempore of the Senate 48 hours in advance if issuing the subpoena.

Finally, this bill would vest in the court the discretion to issue a protective order restricting inquiry to nonprotected activity so that the entire proceeding need not be dismissed. The court would be required to quash the subpoena if there were in question no issue to which the Member or aide might testify except "protected legislative activity."

I would like to insert in the record a copy of the bill. I think it necessary at the present moment only to read how the term "legislative activity" is defined. I read section 2:

As used in this act the term "legislative activity" means any activity relating to the due functions of the legislative process in carrying out the obligations a Member of Congress owes to the Congress and to his constituents, and shall include but not be limited to speaking, debating, or voting in committee or on the floor of Congress, receipt of information for use in legislative proceedings, any conduct in committee related to the consideration of legislation or related to the conduct of an investigation, speeches, or publications outside of Congress informing the public on matters of national or local importance and the motives and decisionmaking process, leading to the above activity or leading to the decision not to engage in the above activity.

I would like to state that this bill makes it clear that a Congressman would not be protected against a civil suit for libel or for slander. This bill is restricted in its application to criminal prosecution.

[The bill follows:]

A BILL To more fully protect the freedom of speech of Members of Congress and to enforce Article I, Section 6 of the Constitution, the "Speech or Debate" Clause

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "Congressional Free Speech Act of 1973".

DEFINITIONS

SEC. 2. As used in this Act :

(1) the term "legislative activity" means any activity relating to the due functioning of the legislative process and carrying out the obligations a Member of Congress owes to the Congress and to his constituents and shall include, but not be limited to, speaking, debating or voting in Committee or on the floor of Congress, receipt of information for use in legislative proceedings, any conduct in

Committee related to the consideration of legislation or related to the conduct of an investigation, speeches or publications outside of Congress informing the public on matters of national or local importance, and the motives and decision-making process leading to the above activity or leading to the decision not to engage in the above activity.

(2) the term "Member" means a present or former Member of Congress.

(3) the term "aide" means any person who assists a Member in his performance of legislative activity.

(4) the term "protected legislative activity" means legislative activity performed by a Member or by an aide on behalf of the Member while he was a Member of Congress.

LEGISLATIVE IMMUNITY GENERALLY

SEC. 3. No court or grand jury shall inquire of a Member or an aide either directly or indirectly into the protected legislative activities of a Member in a criminal proceeding without the Member's consent.

SUBPOENAS—NOTIFICATION AND APPROVAL

SEC. 4(a). The Attorney General of the United States shall personally approve the issuance of any subpoena to a Member who is at that time serving in Congress, and shall notify in writing that Member, the Speaker of the House of Representatives, in the case of a Representative, and the President Pro Tempore of the Senate, in the case of a Senator, not less than 48 hours in advance of the issuance of the subpoena.

(b) The attorney for the government shall immediately notify the Attorney General of the United States of his intent to issue a subpoena to a former Member of Congress or to an aide which the attorney for the government has reason to believe may require testimony relating to protected legislative activity. The Attorney General shall personally approve the issuance of the subpoena, and shall notify in writing that Member, the Speaker of the House of Representatives, in the case of a Representative, and the President Pro Tempore of the Senate, in the case of a Senator, not less than 48 hours in advance of the issuance of the subpoena.

(c) When an aide is served with a subpoena which he has reason to believe may require his testimony on the protected legislative activity of a Member, the aide shall immediately inform that Member.

COURT AND GRAND JURY PROCEEDINGS

SEC. 5(a). Any Member may move in United States District Court to quash any subpoena issued by a court or grand jury in a criminal proceeding requiring him or an aide to appear to give testimony where the Member believes that the subpoena seeks testimony about protected legislative activity.

(b) The Court shall immediately stay such subpoena until it has determined whether the subpoena must be quashed or a protective order issued as required by subsection (c).

(c) The attorney for the Government shall specify the nature and scope of the proposed inquiry. If the court determines that the inquiry may require the Member or aide to give testimony either directly or indirectly concerning protected legislative activity, the court shall either:

(1) fashion an appropriate protective order restricting questioning in such a manner as to preclude questions concerning protected legislative activity;

(2) if there is no possible testimony which the Member or his aide could give on the subject matter of the inquiry contemplated by the court or grand jury, other than that which directly or indirectly concerns protected legislative activity, then the subpoena shall be quashed; or

(3) if the procedures set out in subsection 4(a) were not complied with then the subpoena shall be quashed.

(d) if at any time in the course of a criminal proceeding it appears that testimony is being heard or may be heard from an aide relating to a Member's protected legislative activity but that the provisions of subsections 4(b) or 4(c) have not been complied with then the court shall immediately stay the proceedings, notify that Member and give him an opportunity to move as provided by this section, to quash the subpoena or subpoenas, pursuant to which testimony is being taken.

Senator ERVIN. I also expect to introduce a proposal to amend rule XXX of the Senate rules, which deals with the delivery of official Senate papers to a court. The present language of this rule would remain unchanged.

Rule XXX would be amended by adding a provision which recognizes a broad "Speech or Debate" privilege of a Senator not to testify in criminal proceedings with respect to "protected legislative activity." This proposal would also exempt an aide or former aide to a Senator from testifying on "protected legislative activity," except when instructed to do so by his Senator-employer. In addition, a Senator would be required to inform the Senate when he or an aide is subpoenaed to testify or deliver official Senate papers covered by rule XXX, as amended.

In broadening the "Speech or Debate" immunity by amending the Senate rules, the Senate would be exercising its power under article I, section 5 of the Constitution to make rules governing the conduct of its Members and their employees.

I would like to incorporate in the record, without reading it, the proposed change in the Senate rules.

[The proposed change follows:]

RESOLUTION

Resolved, that Rule XXX of the Standing Rules of the Senate be amended as follows:

"RULE XXX. WITHDRAWAL OF PAPERS AND TESTIMONY BY SENATORS AND AIDES

"1. As used in this Rule:

"(a) The term 'legislative activity' means any activity relating to the due functioning of the legislative process and carrying out of a Senator's obligations to the Senate and to his constituents and shall include, but not be limited to, speaking, debating or voting in committee or on the floor of the Senate, receipt of information for use in legislative proceedings any conduct in committee related to the consideration of legislation or related to the conduct of an investigation, speeches or publications outside of Congress informing the public on matters of national or local importance; and the motives and decision-making process leading to the above activity or leading to the decision not to engage in the above activity.

"(b) The term 'Senator' means a present or former Member of the Senate.

"(c) The term 'aide' means any person who assists a Senator in his performance of legislative activity.

"(d) The term 'protected legislative activity' means legislative activity performed by a Senator or by an aide on behalf of the Senator while he was a Member of the Senate.

"2. Any Senator, or former Senator, may refuse to testify before any court or grand jury in a criminal proceeding concerning his legislative activity while a Member of the Senate.

"(3) No aide or former aide to a Senator or to a former Senator, shall testify before a court or grand jury in a criminal prosecution concerning the aide's assistance to that Senator in the performance of legislative activity by that Senator while he was a Member of the Senate, unless otherwise instructed by that Senator.

"4. No memorial or other paper presented to the Senate, except original treaties, finally acted upon, shall be withdrawn from its files except by order of the Senate. But when an act may pass for the settlement of any private claim, the Secretary is authorized to transmit to the officer charged with the settlement the papers on file relating to the claim.

"5. No memorial or other paper upon which an adverse report has been made shall be withdrawn from the files of the Senate unless copies thereof shall be left in the Office of the Secretary.

"6. A Senator shall immediately notify the President Pro Tempore of any demands for testimony or documents made upon him or an aide which might fall within the provisions of this rule. If the Senate is in session, such notification shall be entered in the Journal."

Chairman METCALF. Your proposed bill and the proposed changes to the Senate rule will be incorporated in the record at the appropriate point in your remarks.

How much time do we have with you?

Senator ERVIN. As much time as you need.

Chairman METCALF. I know of your other business and concern. I was hopeful that we would be able to utilize as much time as possible.

Mr. Brooks.

Representative BROOKS. Senator, I want to thank you for the splendid statement which I think has all the bedrock arguments in it for protecting the Congress of the United States against the executive and judiciary. I share your deep concern about it.

The President's recent comments about his use of the executive privilege prompted a rather forceful response from you. Do you see any inconsistency in our urging a broad scope for legislative immunity, at the same time disagreeing with the President's interpretation of his privilege?

Senator ERVIN. No, I do not.

One of the most remarkable documents in American history is George Washington's farewell address to the American people. It is a message that needs reading and rereading by all of us. In his farewell address, among other things, George Washington pointed out that the Constitution distributed the powers of Government among the three branches of the Federal Government, and he stated the reason this was done was because the men who drafted and ratified the Constitution realized that the occupants of public office are under constant temptation to abuse their power. Therefore, they decided to distribute the power of the Government so that not all would be concentrated in one man or one body.

He also said that it was just as necessary to preserve this separation of powers as it was to create it in the first instance. He gave the virtue of the separation of powers as consisting in the fact that the Republic which the Constitution was intended to establish would be saved by the fact that each branch of the Government would resist encroachments upon its constitutional domain from the other two branches of the Government.

He also closed that portion of his message with a very important statement. He said if the people ever become dissatisfied with the distribution of the powers of Government as made by the Constitution, let them change the distribution by an amendment as the Constitution provides. He said let there be no change by usurpation, for even though a change by usurpation may appear to be good in one instance, it is well to remember that usurpation is the customary weapon by which free government is destroyed. That is the reason it is necessary to recognize and enforce the separation of powers.

Representative BROOKS. Some of the testimony on the newsmen's privilege has discouraged legislation by the Congress to shield sources of information.

The argument is that the free flow of information is better served by fighting challenges on a case-by-case basis.

Is that argument applicable to legislative immunity?

Senator ERVIN. I think the two principles are akin to each other, but they have a different objective.

I think that Mr. Cleveland was right in comparing the importance of the two things. The first amendment recognizes that our institutions of Government will not function properly without the freest and fullest flow of information.

The "Speech or Debate" clause recognizes that Senators and Representatives cannot adequately discharge their duties to the country and their constituents unless they are protected against intimidation by the executive and judicial branches of the Government.

The two principles involved, although they differ in some respects, are both necessary to be recognized and enforced in order to have good government in this country.

As was pointed out in the several statements, the immunity given Congressmen by the "speech and debate" clause is not to aggrandize Members of Congress. It is to enable them to be fearless and courageous in the performance of what they conceive to be their duty to their constituents and country.

Representative BROOKS. One more question.

Do we narrow the constitutional language by legislating a definition of the free speech clause?

Senator ERVIN. I think not. We enforce the Constitution on the basis of what we lawyers call the "necessary and proper" clause. The first article of the Constitution gives Congress the undoubted power to pass any law which is necessary to implement and carry into effect any provision of the Constitution.

Representative BROOKS. You think a broad definition would implement the constitutional intent, not limit it in any way?

Senator ERVIN. The restriction placed on the concept of "legislative activity" in the *Gravel* case is unfortunate. The idea that gathering information for use in a speech is not a legislative activity and the notion that the dissemination of the information afterward is not a legislative activity are restrictions which the Congress must resist.

Woodrow Wilson, a great student of the American system of government, said that perhaps the most important function of a Congressman was the informing function: that is, his duty to inform his constituents of things he considered important and his duty to inform the other Members of the Congress of things he considered to be of public interest and importance.

Chairman METCALF. Thank you very much, Congressman Brooks. Mr. Cleveland?

Representative CLEVELAND. Senator, I was pleased that you concurred with me that we do have some similarity here between the shield legislation and the legislative privilege we are addressing ourselves to.

First of all, I was tremendously impressed with your presentation. I not only enjoyed it, but found it very interesting.

As a Congressman and as a Representative, I would like to address myself for just a couple of minutes to this matter of the so-called errand boy function.

Senator ERVIN. Yes.

Representative CLEVELAND. I have been a little piqued from time to time when critics or opponents or newspapers have sort of referred

somewhat condescendingly to this errand boy function. But in many cases I found that the so-called errand boy function which I call the representative function, representing my people from New Hampshire down here in the bureaucratic jungles of Washington, I find this is very instructive. Sometimes I find that the trail that starts with constituents complaining about some bureau that they think is overreaching its authority or perhaps misinterpreting its authority leads to solid legislative proposals. This has been the case with complaints in regard to social security or veterans' benefits, sometimes, water pollution legislation, highway legislation.

So actually, if you extend this privilege to the legislative function, you can get into quite a debate as to how far that goes.

I am sure you must be aware of that. Mr. Brooks alluded to that in his question.

I would like your opinion. Of course, as a Senator, you may not have to do this as much as the Representative, the Congressman.

Chairman METCALF. Twice as much.

Senator ERVIN. We represent all the people in all districts in the State, we probably get more requests. But I consider it one of the most important functions of a Member of Congress. I think it is a distinct legislative activity, because one of the greatest functions Congress has, is not only to enact legislation, but to see that that legislation is properly executed. It is only as a result of these complaints that we receive from constituents about alleged violations of their rights under such programs as the social security program that we are able to know if the laws are being properly executed.

I think it is a legislative activity of prime importance because it is inseparable from the oversight function of Congress. Also, I think it is a most important function of government because the only way we can make a government as large as ours function properly is to have these complaints of individuals that they have not been accorded their legal rights by some department or agency determined. I think it ought to be a protected legislative function because I think it is essential to the performance of the functions which devolve upon a representative of the people, of a group of people who, if they depended upon their own efforts, could never get any action out of the government.

Our Government has expanded its functions to such an extent it touches all our citizens at so many points that, without what you call the errand-running function of Senators and Congressmen, I do not think our Government would function as properly or as efficiently.

Representative CLEVELAND. I am glad to hear you say that, because you have anticipated my line of questioning. I think what we are faced with here: When the Constitution was written the Government was very simple, confined itself to relatively few things. But now Government is enormously expanded in scope. We have this whole problem of a bureaucracy that may or may not be responsive to Congress or the executive or anybody for that matter. But as Government has expanded, then this role that I call the representative function becomes more important because the average citizen is overwhelmed with the size of it and does not know where to turn when he does have a problem.

Senator ERVIN. Often I am called, as every Member of Congress is called, by somebody who has a death in the family. They enlist our aid to try to get a closely related serviceman back for a funeral. I think that is most important. I think it makes a great contribution to the morale of the armed services, the willingness of people to serve in the armed services.

In many cases we have a claim filed with some agency or bureau and there is an absolute rejection of good common sense as to what is justice in a ruling on it very often by some subordinate. We call it to the attention of the proper department and they correct it, in many cases.

I know I had one case with the VA where a serviceman had attempted to commit suicide while insane. He shot himself and disabled himself. They ruled first that that was not a service-connected disability, and that there was no responsibility in the Federal Government for what happened. When I took it up with them, they changed that ruling.

I think all of us have had countless experiences of that kind.

Representative CLEVELAND. Do you think that your definition in your bill is broad enough to include the entire scope of legislative activity if you construe it to include the constituent request you make on behalf of constituents to prod the bureaucracy to see that the Government is responsive.

Senator ERVIN. I believe it does. If anyone does not believe so, I would be agreeable to listen.

Representative CLEVELAND. You believe so, but do you believe the Supreme Court will concur with you?

Senator ERVIN. I cannot always guarantee what the Court is going to do. But I think if they pay attention to the language in it, they will have to give it very broad scope. In other words, it is broad enough I think to cover about everything that can arise which relates to the due function of the legislative process.

I think as a general definition, it would cover the errand-running function of a Member of Congress.

Representative CLEVELAND. Thank you.

Just one concluding observation. What the Supreme Court has apparently done is to narrow our scope of activity, at the same time when historically the scope of our activity is tremendously broadened by the large number of programs we have enacted and involvements that we have. In other words, this is not the time to narrow the scope because of the fact that the Government is expanding so much; would that be a fair statement?

Senator ERVIN. Yes; that is a very sound observation. I will say this. I served as a judge myself for a little over 15 years. I think if a man spends his whole time judging, he has a tendency to get more or less into a cloister. His function is to hear arguments, and to decide cases. He does not recognize that Members of the Senate and Members of the House have to touch life at all points. We are not restricted merely to one function. The Supreme Court judges do not have experience in the legislative halls, and for that reason they have little appreciation of the multitude of things that properly fall within the scope of legislative activity.

Representative CLEVELAND. Senator, maybe the answer then is that if we had it to do again, instead of coming to the U.S. Senate as you

have done, or to the U.S. Congress as I have done, if we wanted to be politically active, maybe the answer would be to get appointed to the Bench; we would not have to run for reelection, we would not have to rub our noses in the problems of life and we could live happily ever after.

Senator ERVIN. You would not have to run errands for anybody except your wife.

Representative CLEVELAND. Thank you.

Chairman METCALF. Congressman Giaimo.

Representative GIAIMO. Senator, on page 3 you referred to the statement of the Court in the *Brewster* case, where they state that they were satisfied that our history does not reflect a catalog of abuses at the hands of the executive that gave rise to the privilege in England. Do you recall that?

Senator ERVIN. Yes.

Representative GIAIMO. Would that not be one of the soundest arguments for retaining the privilege, if in fact it has led to the absence of abuse?

Senator ERVIN. Absolutely.

Representative GIAIMO. It seems to me that is the finest reason for keeping it.

Senator ERVIN. Yes.

Representative GIAIMO. Further, in regard to that statement, do you think that a court or anyone is able to determine as a fact that abuses of intimidation—of a representative of the people—because that is what the original clause applies to, have occurred? Do you think that any court or person is able to say, with any kind of justification, that history shows there have been no abuses?

Senator ERVIN. No, I do not. History actually shows that in the early days of the Republic, there were great abuses.

Representative GIAIMO. But even coming up to more recent days, do we know if in fact there have or have not been subtle types of abuses, subtle types of intimidation: for example, threats of an indictment by the Department of Justice?

Senator ERVIN. Yes.

Representative GIAIMO. The threat or very statement of an Internal Revenue examination can be detrimental to a legislator. Will that not, or might it not, very seriously hamper him from being fearless—which is the essence of a legislator—in speaking out in behalf of his constituents. Is that not so?

Senator ERVIN. That is absolutely correct.

I might add that is exactly the position that Justice White took in his dissent in the *Brewster* case. He pointed out the fact that Senators and Representatives have to run for election, that necessarily they receive campaign contributions, and that nobody makes a contribution to a Senator or Congressman unless they share that Senator's or Congressman's political philosophy and ideas about Government. People who disapprove of his philosophy do not make any contribution to him.

It is said that the Department of Justice can come down here, if some Senator or some Representative is very vigorously opposing a piece of legislation that the executive branch of the Government wants to have enacted, and whisper in his ear:

We looked at your statement of campaign contributions and you have campaign contributions from Mr. So-and-So and he is engaged in this kind of business and you have been voting, sort of protecting that kind of business and we would hate to indict you for accepting a bribe, but we would suggest that you help us get this piece of legislation enacted instead of opposing it.

I think no man who runs for public office wants to have mud thrown on him by the Department of Justice or anybody else. It takes a mighty courageous man to stand up under those circumstances.

Representative GLAIMO. Would you say that it is to be expected that all Congressmen and Senators under those circumstances would be courageous or would it be a fairer observation to say that they might well be intimidated from doing their duty?

Senator ERVIN. Yes, I think that is calculated. To go back to something that occurred up here just before the time I came here—we used to have Senator Joe McCarthy, who did not mind throwing mud on people. When I came up here, a prudent Senator would walk by like the priest and the Levite, on the other side of the street, because otherwise he knew there would be some mud thrown on him if he thwarted the wishes of Senator McCarthy.

I hate to say anything evil of the dead, but that was the truth.

Representative GLAIMO. Is it a fact that what we are observing at the present time—which I think is the reason people call a situation such as this a constitutional crisis—is a situation where one branch of the Government under another doctrine—which, incidentally, is not clearly enunciated in the Constitution—executive privilege, is keeping its members from being questioned by the legislative branch and, at the same time, we are finding the judicial branch making very real efforts to limit the rights, very real historical rights of the legislators, newsmen, and other people; is that the situation in which we now find ourselves?

Senator ERVIN. That is exactly it. To use one illustration of why the doctrine of separation of powers operates as George Washington said it should operate, there have been occasions when a congressional committee attempted to try a man for some offense and had really no legitimate legislative purpose to be served.

In those cases, the courts have stepped in and have restrained us by confining us, saying that was an improper, unconstitutional act. The court can restrain us. I think it is the duty of Congress to stand up for the rights and powers it has under the Constitution, just like I would say it is the duty of the President to refuse to permit Congress to trespass on his domain. That is the reason our Government has been able to endure because we have had these conflicts from time to time.

If each department stands up and fights for its rights, we are likely to keep the Republic for which the Constitution was ordained to establish.

Representative GLAIMO. Let me ask you another question: What we are talking about here is not to protect anyone from wrongdoing, is that not right?

Senator ERVIN. That is right.

Mr. GLAIMO. What we are really saying is that if a legislator commits a wrong he can be punished for it, but he can be punished by the Congress, not the courts, provided his wrongful act is within the "speech and debate" privilege.

Is it not so that the wrongdoing can be questioned and should be questioned by the Congress itself?

Senator ERVIN. That is right.

There is a very fine case illustrative of that point in the U.S. Circuit Court of the District; some years ago, Senator Cousins of Michigan made a speech on the floor of the Senate and he was sued for that speech by a plaintiff who claimed that he had committed slander on him. The court dismissed the suit on the ground that the speech was made on the floor of the Senate. The court said that, aside from what the constituents of Senator Cousins might do, the only remedy against him for an abuse of his power would be for the Senate to act on the matter and cited the passage that said, either House could punish its Members for disorderly conduct.

Representative GLAIMO. We do have the machinery in the Senate and House to do it?

Senator ERVIN. Yes. I think there are three great restraints.

The first is of course the fact that he can be disciplined by the House of which he is a Member, if he, in the opinion of that House, exceeds the bounds of proper conduct.

The second is, he can be retired from office by his constituents.

The third is the free press of the United States.

Those three things keep us pretty well in line.

Representative GLAIMO. You say he can be disciplined. Would you enlarge on that? How can the Congress discipline him?

Senator ERVIN. Well, in two ways.

We have had the custom of censuring Members. Moreover, by a two-thirds majority of its Members, either House of Congress can expel one of its Members for conduct which they consider merits such punishment.

Chairman METCALF. He could even be expelled?

Senator ERVIN. Yes; that is what I mean.

Representative GLAIMO. It has been suggested that Congress could insure the integrity of its information gathering and disseminating functions by simply removing jurisdictions from the courts to hear such matters.

Do you think that this would be an adequate and acceptable action to take?

Senator ERVIN. I think Congress does have that power. Under article 3 of the Constitution, Congress undoubtedly has power to regulate the jurisdiction of all Federal courts except the original jurisdiction of the Supreme Court, which of course is very limited.

Representative GLAIMO. But it does have the authority insofar as the other Federal courts are concerned.

Senator ERVIN. Yes.

Representative GLAIMO. It can determine their jurisdiction and limit it?

Senator ERVIN. That is one approach.

I think the approach we take here is that the Congress can pass a law to implement the Constitution and make it more effective. Also, Congress can prescribe rules of evidence for Federal courts.

Representative GLAIMO. One final question, Senator.

I know you are very much interested in this and you are working very hard in this area. Isn't it a fact that the important thing here is not

to give unfair protection or undue protection to any citizen, but rather that the essential problem is the intimidation of representatives of the people?

Senator ERVIN. That is right.

I remember a historical incident that when Benjamin Franklin came out of the meeting of the convention after the Constitutional Convention of 1787 had completed its work of drafting the Constitution, he was asked by a lady: "Dr. Franklin, what kind of a government did you give us?"

He said, "A Republic, if we can keep it."

The enforcement of this principle, the separation of powers of Government, is necessary if we are going to keep the kind of Republic that the Constitution was ordained to establish. It is not for the benefit of any Congressman or any Senator or any individual. It is to keep the kind of government that the Constitution contemplated we should have.

Representative GLAIMO. Would you not say it is a pretty awesome job for a Congressman or a Senator to combat the massive executive branch of Government if he does not have this type of protection?

Senator ERVIN. I think it is unwise to expect Congressmen to have enough courage to be entirely free from intimidation unless we have protection against it.

Representative GLAIMO. I believe that the key and essential item involved in this discussion and in this problem is the question of intimidation, which is a very real thing historically; is it not?

Senator ERVIN. Yes.

Representative GLAIMO. And just as real today as it was in past history.

Senator ERVIN. Yes.

Representative GLAIMO. If not more so.

Senator ERVIN. I think perhaps more so today.

Representative GLAIMO. Thank you.

Chairman METCALF. Senator Taft?

Senator TAFT. Senator, I appreciate very much your remarks here today. I would just like to put a few questions.

A few minutes ago, in talking to Congressman Cleveland's question, I pointed out another further advantage that the judges have over us, that is, that the legislation that they pass they do not have to send up to the White House to get signed. [Laughter.]

You seemed to imply a few minutes ago that perhaps some additional action ought to be taken by the Congress with regard to jurisdiction of the courts. Now I would like to address ourselves for a few minutes to that question, whether there should be some action considered by the Congress in this direction.

Going back to our British history precedents, I am reminded of the study that Catherine Drinker Bowen did of the confrontation between Sir Edward Cooke and Sir Francis Bacon. This went on, as you know, for a period of a good many years. It finally ended with the complete ruination of the judge, Sir Francis Bacon, when Sir Edward Cooke got the Parliament to cut off the water.

Senator ERVIN. Yes.

Senator TAFT. Bacon was a rather big spender, for a judge. He was brought to heel in that way.

Are you suggesting that we ought to consider any particular action insofar as limiting jurisdiction is concerned in this regard?

Senator ERVIN. No, I am not, except to the extent that this definition may eliminate some jurisdiction of the Court. I am not in favor of eliminating jurisdictions as a general proposition. But I do say I think that was put in the Constitution for several reasons.

I think the main reason is if the Court went haywire the Congress could cut off its jurisdiction that is, the appellate jurisdiction of the Supreme Court and all the jurisdiction of the Federal courts. I think in the great majority of cases that the Supreme Court makes a decision and the Congress has legislative power in many cases to obviate the consequences of that decision by an act of legislature.

I think that is true in this case. I think we can define what legislative activity is. We can extend the Court's definition if it is necessary for the function of Congress.

I think also, just like in the newsman's privilege, the Supreme Court actually suggested to the Congress that if Congress thought there was a necessity for a newsman's privilege, that it could pass an act to that effect and make the privilege as broad or as narrow as it deemed proper.

Senator TAFT. A few minutes ago we talked about the Congress judging itself. I wonder if you would express an opinion as to how well the Congress does judge itself, what we could do to improve it and, specifically, I would like to know whether you feel there is any way in which the Congress can punish a crime or discipline for a crime or provide a sanction of some kind for a crime within its own procedures?

Senator ERVIN. I would not think that Congress could punish a crime as such, but the Congress has expelled Members of its body for crimes committed.

For example, as I recall one Congressman was expelled I think for running a still. I think Congress can punish a Member and discipline him, but I think that still the business of punishing crime, prosecuting crime, belongs to the executive branch of the Government, and passing on whether a crime has been committed and giving the punishment for it belongs to the courts. But I do not think that under the doctrine of separation of powers and under the "speech and debate" clause that a court has the right or the power to convict a Congressman or Senator for something he does within the scope of the legislative process as defined by the Court.

Senator TAFT. What bothers me, Senator, is how could there ever be a conviction for, say, bribery of a Member of Congress if you exempt this whole area from anything except legislative action?

You say sanctions cannot be voted, criminal sanctions cannot. Are you not just blanketly excepting?

Senator ERVIN. No, I do not say that. If they could show for example, that Congressman John Doe had made an agreement with an outside person that he would take a bribe and they can show that without going into his legislative activity, I think they could make out a case.

Senator TAFT. How could they show that he voted one way—

Senator ERVIN. They cannot. Under the *Johnson* case the Court held that the Government could not. In the *Brewster* case, as Chief

Justice White says the majority repudiated Justice Harlan's opinion in the *Johnson* case.

Senator TAFT. Take another case, How about a case defined by the Constitution in article 3, section 3, which states that treason amounts to adhering to the enemy and giving aid and comfort to the enemy. Do you think that would be covered by this exemption or not?

Senator ERVIN. I cannot conceive of a man actually giving aid and comfort to the enemy while he is in the legislative process.

Senator TAFT. Would not the disclosure of highly prejudicial secret documents relating to military activities in time of war be such a crime?

Senator ERVIN. Well, if they could prove that by something other than what happened in the legislative process.

Senator TAFT. But you think that would be exempt even if it were in the legislative process?

Senator ERVIN. Yes.

Senator TAFT. You think that would be in the national interest?

Senator ERVIN. Yes.

Senator TAFT. To have such a rule?

Senator ERVIN. Yes.

Otherwise, for example, a man may deplore a foreign war and he may make a speech against a foreign war, and some people may say that he is guilty of treason against the United States because his speech encourages our enemies. If his speech could be used as a basis for conviction, the independence of the Congressman would be destroyed.

Senator TAFT. Do you feel you can affect the treason clause in the Constitution by legislative action?

Senator ERVIN. I do not think you can affect the definition of treason, but I think that Government cannot convict a man of treason because he stands on the floor of the Senate and says that his country is engaged in an unjust war.

Senator TAFT. How far does that carry in the legislative activity? Supposing he gets, in the process of inquiry, access to this information and then just makes it public outside of the Congress because he thinks it is important that the people know, but it does amount to aid and comfort to the enemy?

Senator ERVIN. If you can convict a Senator or a Representative of treason on the basis of his remarks on the floor of the Senate or the House, I think you would destroy his independence.

Senator TAFT. I said outside. If he gets information in his legislative activities, but then makes this information which is classified information and, by an ordinary citizen, its disclosure would amount to an act of treason, would he be exempt from prosecution?

Senator ERVIN. You mean if I make a speech?

Senator TAFT. Yes; and disclose that information to the public or deliver it, as is alleged in some cases presently pending.

Senator ERVIN. I think, for example, if a man feels that war is wrong, he has a right to speak. A public man has a right to speak to that effect inside or outside of the Congress. The fact that it may indirectly give aid and encouragement to the enemy does not destroy his right. If it did, it would destroy freedom of speech under the first amendment. If a man goes and communicates information in

secret to the enemy, that would be a different proposition. But I think a man is entitled to make his public speech on any subject.

Senator TAFT. You do not think that the fact it would apply to legislative activities if information he got in legislative activities were delivered to the enemy?

Senator. ERVIN. Unless he has a specific intent, for example, to encourage people not to register for the draft. In other words, if his speech amounts to something——

Senator TAFT. No; I am talking about a disclosure to the enemy in confidence. I mean a clandestine disclosure to the enemy of information, that he got in the legislative process.

Senator ERVIN. If a man clandestinely takes and discloses information to the enemy, he would be subject to prosecution. What I am speaking for is the right to stand up, not clandestinely, but stand up on the floor of the House and speak his honest thoughts even though they may indirectly encourage the enemy.

For example, some of my constituents came up and said, you ought to put an end to the Vietnam war. I said I do not know how I could put an end to it. I am not Commander in Chief. If I issue an order for the armed forces to come home and stop fighting, they would not pay any attention to it.

They said, you can vote against appropriations for the war. I said, no; I cannot do that, because I would be voting against medical aid and food and weapons and munitions for the boys who have been sent over there by our Government.

They said, you can get up on the Senate floor and denounce our presence there. I said, I cannot do that. I am like Senator Crittendon Creighton. When they asked him to do that in respect to the Mexican war, he said, "I hope my country will always be in the right. However, if war comes, I will stand by her right or wrong."

When we got into war, a lot of my friends in the Senate and House did not agree with that thinking. They felt it was their duty to stand up and express views to the contrary. I do not think honest, but misguided speeches ever should be made a basis for criminal prosecution.

Senator TAFT. Would a definition of legislative activity in your bill include a committee report or information gathered for a committee report?

Senator ERVIN. Yes.

In other words, my complaint with the *Gravel* case, is that it says a Senator or Congressman can stand up on the floor of his respective House and he is immune from punishment for what he says there, but it says he can be brought to task with respect to how he got the information that he uses there. That means, to my mind, that the executive branch classifies the document, you cannot use it. You might be convicted of a criminal offense even though you honestly believe that the salvation of your country depends upon the exposure of what is in that document.

Senator TAFT. Thank you very much.

Senator ERVIN. One more thing on that point. Senator Saxbe and myself argued that *Gravel* case on behalf of the Senate and one of the justices asked a very pertinent question there. He said that the information that is collected by the executive branch of the Government is collected at the taxpayers' expense. He said, "I just wonder whether

the executive branch of the Government has the same absolute title to information it collects that I have to my automobile." That is a question I cannot answer. But I think it is worth pondering.

Senator TAFT. Thank you.

Chairman METCALF. Thank you, Senator Taft.

Senator Gravel?

Senator GRAVEL. I have no questions other than to congratulate my colleague on a very, very fine presentation.

Chairman METCALF. Congressman Dellenback?

Representative DELLENBACK. Thank you very much, Mr. Chairman.

Senator, we appreciate your testimony. I would like to ask a couple of questions.

I am not sure that I get the full thrust of your very helpful but still not completely, to me, clear statement.

Do you, in effect, Senator, equate the "speech and debate" clause of the Constitution with legislative activity?

Senator ERVIN. Yes.

Representative DELLENBACK. So that in the narrow language of article I, section 6, which says only "for any speech or debate in either House," in your mind that is equivalent to "legislative activity?"

Senator ERVIN. Yes.

Representative DELLENBACK. Now, if we defined "legislative activity" then, Senator, so broadly as to embrace in effect everything we do as Senators or Representatives; what limits would you see placed on any individual Senator's or Representative's concept of what he or she should do in that capacity?

Senator ERVIN. Well, of course, it would be restricted to what is legislative activity. I think anything that a Senator or Congressman does in the discharge of his duties to his constituency or his country is legislative activity.

Representative DELLENBACK. But does that ride on your concern as a Senator or on some other Senator's concern as a Senator or on my definition as a Representative of what is legislative activity?

Senator ERVIN. Well, I think the House of which he is a member has the jurisdiction to determine whether he has exceeded the bounds of proper legislative activity. But as far as the courts are concerned, they ought not to have that power.

Representative DELLENBACK. So far as the courts are concerned, if I as a Representative were to deem some piece of information necessary for me to perform my legislative duties and if to get that information meant breaking and entering—

Senator ERVIN. No, I do not go that far. If they catch you breaking and entering and do not have to depend upon evidence of what happens in the discharge of your legislative duties, I think they could convict you for breaking and entering.

Mr. DELLENBACK. What if under that bizarre circumstance I were

Representative DELLENBACK. What if under that bizarre circumstance I were to say the only way I could get this information, which is imperative so that I may carry on my duties as a Representative, is by breaking this window and getting into the place because I know the evidence I need is in that room?

Senator ERVIN. Well, I do not think that burglary falls within the scope of legislative activity.

Representative DELLENBACK. I recognize that. I would also, as an individual Representative, find this a bit strange. But the point is, sir, I am left at sea as to where the line you are seeking to draw is between proper legislative activity and improper legislative activity.

Senator ERVIN. I would say if a man stands on the floor of the Senate or the House and makes a speech and refers to any document there, the Government ought not to convict him on the basis of his reference to that document on the floor of the Senate or the House. If they can catch him breaking into some office building up here that belongs to the executive branch of the Government and extracting the document, I think they could convict him of breaking and entering and larceny.

Representative DELLENBACK. May I push it to this point? Who will make the determination of what is or is not proper legislative activity, the courts, the body, or the individual?

Senator ERVIN. If there is any reasonable relationship between a Congressman's activity and Congress' definition of what Members do in discharging their duties to the constituents or the Congress, it should be protected. The point is this: If you can get any evidence outside of activity that occurs in the legislative field, that shows a Congressman or Senator has committed a crime, he is just as much subject to prosecution for that as anybody else. It does not cover larceny. If you can prove it otherwise than by the fact that he is found in possession of a stolen document while standing on the floor of the Senate reading from it, then a Member of Congress could be prosecuted.

Representative DELLENBACK. So then you are telling me that there are some issues which should properly be determined by the courts as to whether or not what you do as a Senator or what I do as a Representative is properly legislative activity?

Senator ERVIN. I would say that as a general rule a Senator or Congressman is subject to be prosecuted in a court just like any citizen for a crime. The only restriction I put on it is that you have to establish that crime by evidence apart from what he does in the discharge of a legislative function as that is interpreted by the Supreme Court.

Representative DELLENBACK. Well, I have trouble, sir, if you will. It seems to me that you circle back on yourself, that you say we are immune under your concept, but the determination of what is within the scope or not within the scope has to be determined by somebody, and I ask whether or not the determination is by legislative use collectively, signed by the President, whether it is by a court or whether it is by me as an individual. But I will not chase it any further.

Senator ERVIN. I think the fundamental distinction is, what evidence do you resort to? If you resort to evidence of what the man does within the scope of the legislative process, you are making him answer elsewhere, in violation of the "speech and debate" clause for something he does as a Senator or Congressman.

Representative DELLENBACK. May I ask one further question, sir?

Should this desired goal—and please do not misinterpret my questions because I want to see the goal of properly protecting legislative activity—should that desired goal be reached by a broader interpretation of article 1, section 6, than the Court has in its recent cases given or by legislation or by an amendment to the Constitution?

Senator ERVIN. I do not think you need it. I think that the power of Congress to define the jurisdiction of courts under article 3, and the

power of Congress to enact a law to implement a constitutional principle under the necessary and proper clause of article 1, give Congress the power to do this.

Representative DELLENBACK. So it is on that last phrase of article 1, section 8, the "necessary and proper for carrying into execution the foregoing powers"?

Senator ERVIN. In addition to the general legislative power. I think Congress has the general legislative power unless it is restricted by the Constitution; if it is permitted by the Constitution.

Representative DELLENBACK. "Necessary and proper," of course, you know far better than I that our Federal Government is one of delegated powers, we must find the authority in the Constitution.

Senator ERVIN. Yes.

Representative DELLENBACK. You feel no constitutional amendment would be necessary?

Senator ERVIN. No, I do not think so.

Representative DELLENBACK. All we really need to do is, through the legislative process, define what is in effect already embraced by article 1, section 6?

Senator ERVIN. Yes. And I would say that if the Supreme Court in the *Gravel* case and in the *Brewster* case had given the same interpretations to the "Speech or Debate" clause which have been approved by the Supreme Court of the United States many times, we would not have had this question arise at all. The Court had cited with approval on many occasions, the definition of legislative activity given by Judge Parsons of the Supreme Judicial Court of Massachusetts.

We had a very narrow argument made in this case by the Solicitor General. He said that since the "Speech or Debate" clause merely mentioned Senators and Representatives and did not mention aides, they could compel the aide to come down and testify in a court before a grand jury as to everything he did to assist the Senator or Representative in the legislative process. It caused me to wonder what the Supreme Court would have thought if we said we had a right to summon their law clerks to come down and tell us what happened between them and the law clerks.

Representative DELLENBACK. Do I correctly interpret your concern as dealing with function rather than really location?

Senator ERVIN. Yes.

Representative DELLENBACK. While the clause says technically in either case, it is a case if we do it here, if we do it outside this building, wherever we may do it, it is the function that is protected, not the location?

Senator ERVIN. Yes, that is right.

Representative DELLENBACK. Thank you.

Senator ERVIN. I would say this whole field is not a simple field. It is a complicated problem.

Representative DELLENBACK. We are both aware of that.

Senator ERVIN. I think the greatest distinction to my mind, is between relying on evidence of the conduct of the Senator or Representative while he is acting in discharging legislative activity to make out a case for conviction of a crime and relying on other kinds of evidence. If you can convict him without resorting to his legislative activity, he can be convicted just as much as anybody else.

Representative DELLENBACK. Thank you, Mr. Chairman.
Chairman METCALF. Thank you.
Congressman O'Hara.

Representative O'HARA. Senator, let me just ask you one question. I am somewhat afraid that whatever we attempt to do by way of legislation or otherwise to protect the prerogatives of the legislative branch, it is going to be interpreted by some, and many of them with malice, as an effort to exculpate ourselves from the punishment for crime that attaches to the ordinary citizen.

Now, you have pointed out in your statement and in your responses to questions that the Congress itself can punish its members for inappropriate conduct and certainly for violation of the laws. But it seems to me that we are subject to some criticism on that ground.

Let's take a clear case of bribery. Let's assume that the facts demonstrate bribery beyond any question. An employee of the executive branch or an employee of a State or municipal government in similar circumstances might be found guilty of a felony and imprisoned. It seems to me the most the Congress could or would do would be to expel a member on a similar finding. Then you would say in effect, that even after he had been expelled, he would not be subject to prosecution.

I really wonder how we meet that criticism.

Senator ERVIN. We get criticized for everything we do by some people. The only way to assure that Congressmen can withstand criticism is by providing that they do not have to answer anywhere else except in the House to which they belong.

The Government would be perfectly free to prosecute any Senator or any Congressman for any crime if it could do so without relying on what he did within the scope of his legislative activity.

Now, for example, in the *Johnson* case, former Congressman Johnson was prosecuted for taking a bribe to help out a savings and loan. They offered a speech which he delivered on the floor of the House as evidence. The Supreme Court quite properly held that they could not use that speech because that was something he did within his legislative capacity. If they could prove a case by evidence not covered by the "Speech or Debate" clause, they could have proved the charge in court.

If a Congressman is going to be prosecuted every time he makes a speech which may favor the position of somebody who made a political contribution to him, he is in pretty bad danger. It is to obviate those things that we propose this. I would recommend that everyone read Justice White's dissent in the *Brewster* case.

Representative O'HARA. But in the case of former Congressman Johnson, did they not eventually convict him on the basis of representations he had made to the Justice Department?

Senator ERVIN. Yes.

Representative O'HARA. Which is sort of the kind of quasi-legislative activity that we have just finished agreeing ought to be protected, representing citizens before Federal agencies.

Senator ERVIN. The difference was, that they could not convict him on the bribery charge without showing this speech. Of course he violated a statute. The statute says that no Member of the Congress can accept compensations for going down and representing a client before

a department or agency of the Federal Government. That is a very wholesome statute. It is not the business of the Congressman to take any compensation except his salary for anything done in the discharge of his legislative function.

Also, they have indicted people for funny things that I do not quite understand. In the *Johnson* case, the indictment was in part for conspiracy to induce an official of the executive department of the Government not to use his best judgment in favor of the United States, which I think that is a very strange kind of crime. I think the due process clause would say you cannot define a crime by referring to the man's best judgment because the man's best judgment may be one thing one day and another on another day. We are not always in top condition.

Representative O'HARA. I would just conclude, then, Senator—I think your response is very good—that we might be in a better position if we accompanied any legislation that we enact on this subject, and of course this committee cannot report any legislation, but if we accompany any legislation we eventually recommend with some changes in House and Senate procedures to provide a regular and effective method of bringing instances of misconduct before the Senate and the House. It has been a long time since those procedures have been invoked.

Senator ERVIN. Well, I do not think they ought to be invoked very much, because I think the interest of the country is served by giving everybody free rein on what they say. I think that, with any kind of a reasonable limitation, a Senator and Congressman ought to be allowed to make a damned fool of himself if he wants to, no matter how much it displeases his colleagues. I think that is the only way you are going to get all views expressed.

I would be very slow to set up a strict code of rules because when you start to define things precisely in a code—what is bad conduct for a Congressman, going beyond very general terms—you tend to lock the Congressman in, but you tend to lock whichever House it is, out.

Representative O'HARA. Thank you very much, Senator.

Chairman METCALF. Thank you very much, Congressman O'Hara.

Senator ERVIN. Thank you very much. I thank you all.

Chairman METCALF. Just a minute. You are my lawyer over there in the Senate, Senator.

Senator ERVIN. And I might say I will maintain the secrets of any confidential communication we have.

Chairman METCALF. I am sitting here in this committee room and I suppose that even under the decisions of the Supreme Court the things that I say here, this is one of the places that the Constitution says. But let me propound a question that has arisen. And I will give you a little background.

I am on the committee for the use of the duck stamp money for the purchase of land for wildlife and waterfowl refuges. That is the most rapidly accelerating land in value in the United States.

So last year Congressman Dingell and I proposed, and the duck hunters of America agreed, that we increase the price of the duck stamp to \$5 in order that we have some money at the present time in order to purchase land immediately.

Now the other day I went down to the committee and I found out that the \$2.5 million that we had raised from the additional increase

of the duck stamp was impounded by President Nixon or Roy Ash or somebody down there in the executive department.

Now in my opinion, that is stealing from the duck hunters of America. And I am going to put that in a newsletter to the various people from the wildlife factions of the country and just say that we raised your duck stamp to \$5 and the President has illegally and unconstitutionally impounded that money and destroyed and prevented the opportunity that we had to buy this land at a cheaper price, and next year it is going to be twice as much.

Now, under the *Gravel* decision and the *Brewster* decision, in a newsletter can I do that?

Senator ERVIN. No, no. I do not believe you can do it under my bill because they still can sue you for libel.

Chairman METCALF. Yes. But truth is a defense for libel.

Senator ERVIN. I think if you avoid any reference to larceny and say it is unconstitutional, why you could.

Chairman METCALF. Well, it is illegal. But I found that out in my official capacity down there. I did not break a window. Congressman Dellenback. I just went down there and they said this money has been impounded by them.

I said what right have they to impound it?

He said they told us we just cannot spend that money. Now we represented to the duck hunters of America that if we could get a few more dollars, we would spend it right away and buy some of these refuges.

The President of the United States has said, you cannot do that, we are just going to keep that money, they cannot spend it for anything else. But can I put that in a newsletter and inform, disseminate that information and inform my constituents about it?

Senator ERVIN. I think you can tell your constituents that the power to make a law belongs to the Congress and it is the duty of the President, by the terms of his own oath of office, to see that that law is faithfully executed and that he has not performed that constitutional obligation.

Chairman METCALF. That is what I propose to do, of course. But as my lawyer under the *Gravel* and *Brewster* cases, I want to consult you about it.

Senator ERVIN. I would just leave out any reference to such things as larceny.

Chairman METCALF. You do not think I should say there is larceny involved?

Senator ERVIN. No; because I think they are just refusing to spend it. They are not intending to divert it to their own use. We will say something more about it off the record.

Chairman METCALF. I am not so sure.

Senator ERVIN. They are just trying to keep it from being used at all.

Chairman METCALF. I think the whole question, however, is as you have stated, not only what we say on the floor of the Senate or in these hallowed rooms of the committee; it is our opportunity to gather information legitimately and without breaking windows or committing burglary, and to disseminate that information to our constituents,

and exercise some of the leadership that is expected of Members of the Congress.

Senator ERVIN. That is exactly what this bill, in defining legislative activity, undertakes to do.

I would like to make it very plain that this bill does not attempt to exempt any Senator or Congressman from liability in civil actions for defamation or from liability prosecution for criminal conduct. What I have been saying about criminal prosecutions is based upon the holdings of the Supreme Court that a Senator or Congressman cannot be convicted on the basis of evidence of his activities which are covered by the "speech or debate" clause. This bill merely exempts Senators, Representatives, and their aides from being compelled to testify before grand juries and courts in criminal prosecutions in respect to the activities of Senators or Congressmen falling within the scope of the definitions of legislative activities as defined in the bill. It is an effort to protect Senators, Representatives, and their aides from testifying in fields of legislative activities, as defined in the bill, and is made necessary by the narrow construction placed upon the "speech or debate" clause in the *Gravel* and *Brewster* cases.

Chairman METCALF. Well, Senator, I am most grateful to you. You have made a brilliant and eloquent defense of congressional privilege, congressional immunity. You have helped us in formulating our ideas in a great exposition of immunity of our branch of Government.

Thank you for coming here and spending your time with us today.

Senator ERVIN. I think the importance of this "Speech and Debate" clause is illustrated by the case of Senator Cousins, who was sued for slander by a man who claimed "he told a falsehood on me while speaking in the Senate."

Well, if he could be held liable for that, he would be scared to get up and say much for fear of somebody else suing.

In other words, you have to protect what conduct on the part of the Senator, of a Congressman sometimes, may be from a social standpoint pretty bad in order to make him free and courageous.

Thank you.

Chairman METCALF. Thank you very much, Senator.

Our next witness is the distinguished and outstanding Senator, a great friend of those who are in the Senate.

Senator Saxbe has been attorney general of the State of Ohio, he also participated in the brief representation of the Senate in its appearance before the Supreme Court in the *Gravel* case. He is a splendid, eloquent lawyer and very able proponent of congressional immunity.

We are delighted to have you here. We are glad to have the benefit of your experience, Senator Saxbe. Go right ahead.

STATEMENT OF HON. WILLIAM B. SAXBE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator SAXBE. Thank you very much, Mr. Chairman and members of the committee. I am very pleased to be here.

I have a prepared statement which I shall put in the record and not proceed to read.

PREPARED STATEMENT OF WILLIAM B. SAXBE, A MEMBER OF CONGRESS FROM OHIO

In June of 1972, Senator Sam Ervin of North Carolina and I made an unprecedented appearance before the Supreme Court of the United States. We represented the Senate in support of congressional immunity as set out by article I, section 6 of the Constitution of the United States.

In 1971, the Justice Department filed suit against Senator Mike Gravel of Alaska after he read parts of the secret "Pentagon Papers" into the record at a midnight session of a subcommittee of the Senate Public Works Committee and made subsequent arrangements for their commercial publication. By this action the executive branch of the Government attacked congressional immunity.

The purpose and historical use of congressional immunity is not to protect Members of the legislature, but to permit them to perform their duties and to fulfill their obligations as elected officials. It is not for the executive branch to challenge, or the judiciary branch to judge a legislator for his choice of issues or his method of informing his constituents.

I strongly believe that neither the executive nor judicial branches can be allowed to dictate the bounds or congressional privilege if a meaningful separation of powers doctrine is to be retained, even though I feel that Senator Gravel deeply abused the rules of the Senate. While possibly adhering to the letter of the rules, he certainly violated the spirit of the rules. I believe that the Senate has the sole responsibility in deciding to inquire into the activities of one of its members. Any reprimand or punishment is for the Senate alone to mete out.

On June 29, 1972, the High Court ruled against congressional immunity in a 5 to 4 decision. I believe this to be an unfortunate assault on congressional independence. There is, in fact, a possibility that the true effect of this opinion presents a clear and present threat to the continued independence of Congress as an equal and coordinate branch of our Government. The constitutional language in question is of vital concern to all Americans because it is a bulwark of the separation of powers between our three branches of Government. It is imperative that we protect Members of Congress from intimidation by the executive or judiciary through the device of judicial inquiry into legislative activity.

Although I respect the High Court's decision and shall adhere to its theory, I question whether it is in keeping with the best interests of the country. During the 93d Congress I shall discuss with my colleagues in the House and Senate the possibility of defending our rights under the speech and debate clause against these grave threats to our independence and prerogatives by any other branches in our system of democracy.

Senator SAXBE. I associate myself wholeheartedly with the statements of Senator Ervin, whom I respect very much. I will point out where we perhaps differ, but in regard to the immunity I certainly thoroughly agree on it. I think it is one of the extremely important elements now coming into focus in this country.

I want to explore two areas that have caused me great concern, two areas that you have touched on here to some extent this morning, but I do not think you have gone into deeply enough.

I was interrupted in what I thought was an eloquent argument to the Supreme Court, as only the Supreme Court can interrupt your train of thought, and those of you who have had opportunity to argue there know what I mean: I was interrupted by the very questions that Congressman Dellenback raised here this morning. They interrupted me and very pointedly asked: "Now, where does this break down? In other words, when is a Congressman subject to the laws of the country?"

Now, I forget which Justice it was at the time, but he said, suppose a Congressman is driving to the session and he runs over somebody, or he is involved in some other kind of accident, is he free of arrest and prosecution?

Suppose, as has happened you will recall, during the abolitionist days, on the floor of the Senate, he takes a cane and thrashes another Member and perhaps, as did happen on the floor of the Senate, permanently injures him. Is he subject to criminal prosecution?

Or, to take this even further into the quagmire of locating the point at which he is subject to civil authorities or whether he is subject to the Congress alone, he makes a vicious and violent statement, well knowing it is false, and with the intent to harm someone and it does harm someone—in other words, for those of you who are lawyers, all the elements of making a case—does this therefore throw him open to it?

Just as Senator Ervin had some difficulty this morning in answering Congressman Dellenback at what point this occurred, I also had extreme difficulty in doing this. I think it would be a breach of the peace. If you go back and explore what breach of the peace is, a breach of the peace is an act against the quiet enjoyment of the people of the community. It is a crime against people and not something that is generally clothed with immunity.

Each case would have to be determined by a court.

Here, of course, we are only protected by the customs and the body of the law.

He spoke about Senator Cousins, who was definitely well within his rights in pointedly criticizing someone, but perhaps being wrong in that criticism. He was clothed in this immunity.

The Representative or the Senator, on the other hand, who assaults somebody in the streets of Washington is obviously beyond any immunity. He is no different than any other citizen.

One of the reasons that the traffic thing is sticky is that you do have immunity coming and going, also. Maybe your coming should not be interfered with because it could be of extreme importance to the outcome of Senate business. However, usually this does not occur, because you are not going to run away. You are available at a later time. So, this is not of great concern.

But if you breach the peace, then you are subject to arrest and prosecution.

It has to stand on each individual case. It seems to me that we have a body of law that in the past has upheld this.

In the *Gravel* case, I think all of you are well aware that I disagreed most strenuously and pointedly with the Senator from Alaska on his behavior. I thought it was unbecoming. But at the same time, it did concern itself with things that I felt were clothed in immunity of the Senate, and so did vigorously argue that position. In no way was it a breach of the peace. It was solely involved with the dissemination of information which he thought the people were entitled to.

I complained about the time that he had his meeting, the circumstances, whether or not there was adequate notice. This has since been covered by a change in the rules of the Senate. At the time, I did not agree with him, and still do not, as to the circumstances of that whole situation. But in no way could it be considered a breach of the peace.

Therefore, the Senator or the Representative who disseminates or gathers information for the purpose of informing the people of this country does enjoy this immunity.

I also agree with Senator Ervin that there is no constitutional amendment needed. In fact, I think any constitutional amendment at this time would simply bring about a new rash of test suits, and it probably would be 20 years before a body of law was settled in this regard.

I think the *Gravel* opinion was wrong, and I so say in my statement.

I think it invades an area which makes it dangerous. I do feel that generally the law has respected and regarded this breach of the peace and distinguished it rather well from the conduct that is generally referred to as subject to immunity.

The second thing that I want to touch on—I know the hour is late and I will not take your time too much—because it will be of great concern in this Congress, is the question of executive privilege.

I was shocked the other day to see that Senator Ervin said that if Mr. Dean did not appear and testify in regard to the Watergate affair and the information he had, he would try to direct the Sergeant at Arms to go down to the White House and arrest Mr. Dean.

Here we are thumping the tub for legislative immunity, and at the same time drawing ourselves into an area which I think is not plain in regard to executive immunity.

Executive immunity is nothing new. It has been exercised many times. I am also on a committee with Senator Metcalf that is concerned with the impoundment, and it is giving us quite an area of concern right now.

I have instances similar to Senator Metcalf's duck stamp money. I am particularly interested in a quarantine station that is justified by every known means. The amount of money is insignificant. It is impounded by people who know absolutely nothing about what we are trying to do in a quarantine station to improve our balance-of-payments situation.

I still feel that the executive authority and the executive immunity and the executive ability for impoundment has served well the processes of this country and distinguishing between the several branches of Government.

Chairman METCALF. May I interrupt, Senator.

Whether you and I agree or disagree—by and large, we agree on this impoundment proposition—that is not the question, as I see it. The question is: Can I tell my constituents about how I feel about impoundment, which may be exactly opposite to the way you feel about it?

Senator SAXBE. Yes; I think you can go even further than Senator Ervin said. I think you could say that they have stolen the money because, as a figure of speech, everybody knows that you do not mean to—

Chairman METCALF. I mean actually appropriating the money.

Senator SAXBE. You could say that they murdered the intent, you can say that they kidnapped, and so on and so forth. What you are using is a figure of speech.

If you said, for instance, that Roy Ash murdered someone who disappeared on the streets of Washington within the last week, then I think that is another matter entirely.

I think there is no limit on what you can say to your constituency about what happened to the duck stamp money.

Chairman METCALF. Or the general impoundment principle. It is not a matter of who is right or what our judgment is. It is a matter of what leadership we are allowed to exercise in disseminating information to the people of the country, is it not?

Senator SAXBE. Yes, sir.

I might say that the first amendment has been extended by the courts so broadly within the last few years that it extends generally our power and, therefore, I think that the *Gravel* decision is against the generally accepted extension of the first amendment. It is a very disturbing extension to me.

Yesterday the court came out with a decision that said that you could not dismiss a student who was distributing literature containing dirty words around the campus. We are not here to debate that now, but it is another extension of the first amendment. They said if he is distributing information around the campus, just because there are some dirty words in it you can no longer dismiss him for that reason, which is another extension, any way you look at it.

We are cutting back on legislative authority.

Chairman METCALF. We could not use that language on the Senate or House floor, could we, because we would be disciplined.

Senator SAXBE. We would discipline ourselves. A point of order would be called. If you persisted, obviously, you would be censured or dismissed, because we are the judge of conduct on the floor and conduct in the carrying on of our duties.

Therefore, it disturbs me that in this current dissatisfaction of Congress with the executive, which is natural when you have an executive of one party and a Congress of another, Congress now begins to talk about limiting the power of the executive. This is no time for this when we are fighting for our own freedom and our own right to do what we want to do.

I do not believe that the executive privilege when extended to the President's attorney, as he is acknowledged to be, is stretched by the executive. I think we all get a little intemperate. Just as the Court and the executive want to limit our authority, so we in turn say, "We are going to limit the President's authority. He has no right to executive privilege."

This is unfortunate, because it will weaken our case.

Chairman METCALF. Senator, I appreciate and I know every member of the committee appreciates the forthright statement you have made, that you did not approve of what our colleague from Alaska did, but he had a right to do it. You appeared to defend the Senate before the Supreme Court.

Did you experience any repercussions from that at home as far as your people in Ohio were concerned?

Senator SAXBE. No. In fact, such things usually have little impact. To the average person, not learned in the law, it is all Greek to him, anyway, that goes on down here most of the time, let alone when you go to the Supreme Court. They wonder what you are doing there, but that's about it.

Chairman METCALF. All of us wonder sometimes what we are doing or wonder what the Supreme Court is doing.

You talked about executive privilege. I certainly am persuaded. I think you made a strong statement about it, and about judicial immunity. But both of those things are sheer inventions of the Court as against a specific constitutional provision for the legislative immunity.

Senator SAXBE. They have to answer for their acts elsewhere. If anything, they are weaker in their claim than the legislature is because,

as you just stated, it is specific that they do not have to answer for their acts.

Chairman METCALF. Mr. Brooks.

Representative BROOKS. Let me say I appreciate very much, Senator, your very forthright defense and clear understanding of legislative immunity and what it means to the country and to the people, not just to Members of the House of Representatives and the Senate.

I would hope that your previous exposure down in the Ninth Congressional District—in Beaumont, Galveston, Baytown, and Port Arthur—helped to substantiate and bolster that dedication to freedom for the Members who are elected to the House and Senate.

I thank you for being here and taking time out to do it. I think your statement was excellent, well thought out. I appreciate your courage in behalf of the people of this whole Nation who will benefit from your defense.

Senator SAXBE. Thank you, sir.

Chairman METCALF. Congressman O'Hara.

Representative O'HARA. Thank you, very much.

I would be interested in hearing your observations on the *Brewster* case and its implications for the doctrine of legislative immunity.

Senator SAXBE. First, I have to confess that I do not have the intimate knowledge of the *Brewster* case that I probably should have to comment on it.

My limited knowledge does indicate to me, however, that again the Court took an opportunity to move into the area of legislative immunity. None of us would condone the actions of Senator Brewster. I think most of the people who are closely associated with this case know some of the circumstances that went into it; that Senator Brewster was not perhaps in a position to make intelligent decisions at the time of some of these circumstances.

However, the very fact that he was prosecuted for what was really an action on the floor and these actions were used in the prosecution, is a very disturbing element.

As Senator Ervin pointed out, if bribery exists and it can be demonstrated that a man, like Congressman Johnson, actually intervened with an agency, then I think bribery is a proper consideration and was in that case.

While I do not think it well to comment on Congressman Dowdy's case, at the same time I think an examination into that case indicates that this, again, is an area not concerned with actions taking place on the floor or in a committee of the House.

However, in the *Brewster* case, it did. It is committee action and floor action that they are talking about. To me, this indicates that whatever his indiscretion was—I do not think there is anyone who does not find him indiscreet—it was a matter for the Senate. I am the first to acknowledge that the Senate has been remiss in the policing of its own house.

For instance, in the *Gravel* case, I felt that he had violated the spirit of the Senate, and I said so on the floor of the Senate. He had violated it by attempting to call a meeting without proper notice and by otherwise conducting himself as unbecoming and undignified in the matter of the Senate.

It became immediately a partisan affair. This so often happens. There could not be any proceeding. It was so partisan that nothing could be done.

The Senate and the House, obviously, over the years needed great provocation to act in an aggravated situation, and that weakens our claim that we police ourselves, because you come back and say, "You haven't done it. Why haven't you done it?"

If we are interested in protecting our immunity, I think the best way to do it is to have an Ethics Committee that functions and to have a regular procedure for disciplining, one which will not bog down in partisan affairs every time something happens.

Representative O'HARA. I very much appreciate that observation. I think it is valid.

Thank you, Senator.

Chairman METCALF. Congressman Dellenback.

Representative DELLENBACK. I, as one member of the committee, very much appreciate your testimony today and your remarks earlier about the concept of where you draw the line and who draws it.

May I ask you whether you in effect would equate the speech or debate clause of article I, section 6, with the term "legislative activity." The protection set forth in the Constitution is in very simple language, and you are aware of it. It says only "and for any speech or debate in either House."

Senator SAXBE. This began as one of the principal points of discussion when we prepared our brief in this case. You have the brief and have read it. Fred Vinson has also prepared a brief in a pending case that will be decided sometime this spring. Some of you are familiar with that. There he goes even further into this.

While his case does not particularly concern a Member of Congress, nevertheless the immunity extension does concern it, and he has prepared a very knowledgeable brief on this which should be a part of the records of this committee hearing just for your own information. I will see that you get a copy.

I think if we just say those actions that are limited to the floor of the House, that was probably all that they contemplated at that time, because a Member of Congress or the Senate did not even have an office when the first amendment was adopted. They conducted themselves out of their hip pocket. Most of them did not even have any staff. Most of them kept their belongings in the desk on the Senate or the House floor and worked out of that desk, very much like our State legislatures today.

In fact, there were fewer people there than there are in the State of Ohio at the present time or in the State of Maryland; 3 million people. There was no contemplation at that time.

So, like other parts of the Constitution, we have to extend them on the basis of the overall general meaning. I think the overall general meaning was anything that involved the collection of this information or the dissemination of this information.

While at the time it had to do only with the floor because that was the only place they had, I think today we would have to extend that to the assistant and to the fact that if you went to your home State, in your case a long ways off, and made a speech that pertained to circumstances in the Congress, the immunity would still extend.

There is one "if" on that. The question arises in the set of circumstances that I put where you have all the elements of a civil suit. You say something that you intend to hurt somebody, to harm them. It does in fact harm them. In other words, the intention follows through and they are harmed. The question is whether you would be covered on that part of it in the State of Oregon.

I think, there again, you get down to a pretty sticky point, because all of those elements are present which create libel or slander or whatever you want to call it. That is the way it is set out.

Representative DELLENBACK. This is one of the things which deeply troubles me as a lawyer as well as a legislator. When we look at the language in the Constitution proper, shy the amendments, we recognize that with the passage of 200 years, there are words that do not seem to apply today, that do not fit the situation that exists today because it is so different from 200 years ago.

If we are to make the Constitution apply to the present situation, we would go at it in one of two very dissimilar ways. We reinterpret, for example, as article I, section 8, has been stretched to be interpreted as the interstate commerce clause, where we stay with the language but the interpretation broadens. Or we go to the amendatory process, saying that was not covered in the original and, therefore, if we want the Constitution to apply to the changed circumstances, we amend the Constitution.

I am troubled, as I look at this language, by its very narrow technical scope. You have alluded to one of the concepts. If we look at the first phrase, it says: "for any speech or debate" and, second, "in either House." You have stretched the geography by saying if I return to my home State of Oregon or you return to your home State of Ohio, "in either House" may be stretched to cover it.

But I have trouble with the "speech or debate," because maybe that is all that was intended to be covered. I want to see the exemption more than just what is said there, on the floor.

It may be we will have to go to the amendatory process—I am not saying this is a final judgment; I am merely putting the question to you—rather than stretching those very limited but very precise words, "speech or debate," to reach what we now want to call all legislative activity.

I have trouble, maybe not with the preparation of the speech and talking to people. You cannot take it from its origin and say the speech really began when I stood up on the floor and opened my mouth. It includes the thinking process and all the preparation.

I have more trouble in what happens afterwards, if I want to expound on it, not in speech or debate or not in preparation for speech or debate.

I think it a very important function to go back and talk to my people and say this is what happened, so they understand; but I am not sure that is covered by this.

Senator SAXEE. I think you have to go back, again, to look at the circumstances that surrounded the country at the time this was done.

Congress was at most a part-time job. Congress was never considered to be a full-time job. They thought they would come here and do the business of the country in not to exceed 60 days, and that, therefore, all of the business was conducted here.

I do not think there is any question that they alluded to the Halls of the House and the Senate when this was put in there.

What you have suggested is that it should be handled by an amendatory process. This we confront at every step of the way in trying to interpret the Constitution.

You talk about the interstate commerce clause. We go to the 5th amendment or the 14th amendment whereby we brought all this stuff over to the States, which no one ever considered even as late as 30 years ago or 40 years ago when they started to bring all of this over under the 5th and 14th amendments.

I think this can be accommodated within the original concept, and that the amendatory process would not necessarily have to be part of it.

One of the other areas that I think we have gone far astray on, however, is the question of separation of church and state. When the Constitution was written, I do not have any reservation in feeling that they were concerned, not with having church in the schools and church in our public lives, but, rather, one church, the Church of England.

This was, to me, the concern of theirs. So when they put in there this freedom, presumed freedom, they were not talking about taking prayer out of the school or out of the public lives and so on. What they were saying is that the Church of England, which had been interfering for 500 years in the English-speaking people's lives—not 500, because it was not founded until the 16th century, but nevertheless, it was an integral part—and the Catholic Church before that. So they said we do not want the Catholic Church or the Church of England. They did not say we do not want God, because they began all their proceedings with prayer and it was built into everything that was done.

I think it was inconceivable to that group that we would come down to a Supreme Court interpretation of today to say God is not welcome in our schools or institutions, resulting in the Jehovah's Witness cases and O'Hare cases and so on.

So again, to temper this with a little good sense, as the religious thing was not, I think it is reasonable to say that this man, even though he is on a full-time job now, as we all are, and even though he speaks and debates many places other than the Halls of Congress, that he is still clothed with the immunity and his great number of staff assistants are also clothed as long as what they are doing is directly—and I think directly is an important word there—connected with the actions of this legislation or—

Representative DELLENBACK. I do not have any trouble with the last part of it, Senator; as you say, if you have staff, to draw a line between what you ask one of your people to do and you yourself doing it.

Senator SAXBE. And what he does on his own. I mean if the staff man is on a frolic of his own, there is no coverage.

Representative DELLENBACK. We are familiar with agency law. That is roughly analogous to what we are talking about here.

Senator SAXBE. Right.

Representative DELLENBACK. But I am still left with a very serious question on the first part of it. If we define this legislative activity as the equivalent of speech and debate, I am still left with the serious question in my mind, again as a lawyer, of who defines it: individual Members of the Congress, whether they be Senators or Representatives, the body itself in rules, through the legislative process by enact-

ing a statute, through a court sitting in determination of whatever we did, or by our body itself determining what it meant by its rule or by the statute.

It is an awful shifty ground, because if you once say somebody other than the individual member determines it, then you have gotten into an awfully difficult situation—then you are ending up with the possibility of the court making the determination.

Senator SAXBE. I think that is true. I think we are in this area right now, but I think we are better off in this area, where it is a subject of debate, as it is today, than we would be saying that it is a judicial matter or purely a legislative matter.

Now as Senator Ervin stated here, and as has been explored a number of times, and the confrontation has not yet come, the Congress can limit and prescribe the jurisdiction of the courts of this country because that is specifically in the Constitution, with the exception of the limited, very limited powers of the Supreme Court.

Now when you have a confrontation like that, and suppose it would come and it probably will come someday, you are going to have a situation like Mr. Lincoln told Mr. Taney, he said the courts made their decision, let them enforce it.

I think we are approaching a situation like that, if for instance Senator Ervin or the majority of the Senate would send the Sergeant at Arms down to the White House to arrest Mr. Dean, they had better find out where the troops are before they start.

Chairman METCALF. Would you yield?

Senator SAXBE. This is a conflict that is not reached, is not ripe.

Representative DELLENBACK. I yield to the chairman, of course.

Chairman METCALF. I do not want this dialogue to go any further without interjecting a proposition that it would seem to me that regardless of what the Constitution says, the Congress is the legislative body, it can say we have certain prescribed immunities, without amending the Constitution.

So Senator Ervin has come in here with a proposed bill that says that certain legislative activities, as defined by the statute, shall be grounds for immunity for both the Senator or the Congressman and his aides and assistants. It would seem to me that whether it is Mr. Dean down there, and I am inclined to concur with you that the President is entitled to have his own lawyer just the same as the rest of us, we do not have to have an amendment to the Constitution to give us certain immunities that we feel are necessary for carrying out our legislative activities; is that right?

Senator SAXBE. And as members of that committee, we are going to put these together.

Chairman METCALF. That is right.

Senator SAXBE. And I will support them.

Now, whether or not the Supreme Court will support them, if and when we have another *Gravel* case that comes before the court, and we say—

Chairman METCALF. If we have a *Gravel* case and we say that by statute—

Senator SAXBE. Correct.

Chairman METCALF. That in these particular cases these things are legislative activities for both Senator Gravel—and he was abiding

by the nebulous rules of the Senate at that time anyway—or his aides or assistants, then it would seem to me that the Supreme Court, even under the present decision, would say “Well, the Congress and the legislature have spoken and therefore they have described the legislative action.”

Senator SAXBE. And they would be extremely reluctant, as they were not in this case. I think if there were such a body of law or such a statute, they would be extremely reluctant to invade this.

Chairman METCALF. To say that was unconstitutional to give certain immunities when they have arrogated to themselves without any constitutional provision a similar set of immunities.

Representative DELLENBACK. May I ask the chairman while we are involved in this very helpful trialogue—

Chairman METCALF. I do not know whether it is helpful or not.

Representative DELLENBACK. I do not know whether there is such a word as “trialogue” or not.

Chairman METCALF. It sounds good.

Representative DELLENBACK. Are you saying, Mr. Chairman, that we would have the power to enact legislation, dealing with the immunity question, under our power to make laws necessary and proper to execution of the foregoing powers, meaning article 1, section 6, or some under independent power?

Chairman METCALF. I am suggesting that we would have the power to enact legislation binding us, whether they had article 1, section 6, or not.

Representative DELLENBACK. So it is in general a power?

Chairman METCALF. I am saying that the executive department and the judicial department cannot, because of the existence of article 1, section 6, cannot pass automatic legislation, as they passed in the abortion cases and so forth, and prosecute.

Now that was the interpretation in the *Gravel* case and the *Brenster* case. But I am saying that whether that was in the Constitution or not, we can say that there are certain immunities for the executive department, for the judiciary, and ourselves as a part of the legislative activity.

Senator SAXBE. Mr. Chairman, the weakness in our case is that I think we would be extremely reluctant to set up rules and regulations by which we would measure the conduct of a Member of the House or the Senate.

Chairman METCALF. Well, we have rules, some rules.

Senator SAXBE. Well.

Chairman METCALF. As you pointed out, you cannot beat another Senator over the head with a cane any more because we have a rule that the Sergeant at Arms takes the cane away from you before you get on the floor of the Senate.

Representative DELLENBACK. May I just ask a couple more questions?

Senator SAXBE. That is a hard one.

Representative DELLENBACK. Then we will conclude. We have been into an important issue and it has been a complex one.

Senator SAXBE. Yes.

Representative DELLENBACK. As you have said.

When you attempt to draw the limitation on the speech or debate clause and you use breach of the peace. I believe, as the limitation, we are thrown back again on the language of article 1, section 6, which is intriguing. If there were a comma in a certain place instead of a semicolon, then you would find both enforcement for your position and a broadening even beyond what you said, because the language of that sentence, rather than the phrase "They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same;" and if at that point there were a comma, and then it went on as it does, it might be easier to take the "breach of the peace" and apply it to the last piece. But there is a semicolon. So you have to make up the breach of the peace out of other clauses to make it apply to a particular situation.

Senator SAXBE. That is right. But I think that has traditionally been the line of demarcation.

Representative DELLENBACK. All right. If you did then, to follow the question that Senator Taft, your colleague and mine, was asking a bit ago, would you also take treason and apply it in that situation as an exception? If a Member were guilty of treason as defined by the statute on section 3, article 3, but basically as defined by statute, would the legislative immunity apply to treason?

Senator SAXBE. No; I do not think so.

Representative DELLENBACK. Nor would it apply then, I assume, to a felony?

Senator SAXBE. No; and I think this is what I was trying to refer to when a man comes in and beats the other Member over the head with his cane and injures him permanently, which was the case in this instance, he is subject to arrest and prosecution, for whatever degree of felony it was. I mean whether it is assault, aggravated assault, or it could be murder.

Now, on treason. Senator Ervin delineated this rather well, but at the same time I did not find his answer satisfactory in regard to what is a secret that he delivers over to the enemy.

Now this was debated on the floor of the Senate with regard to the *Gravel* case.

Suppose that the evidence, or the information, that the Senator released to the enemy was of great importance, in other words, the location of a target and the target, so located, was there and was hit and thousands of people died or something like that; suppose it concerned the intricate workings of a mechanical device, like the nuclear device. It could be triggered or could be otherwise made impotent by a certain type of knowledge; in other words, this is the historical meaning of treason. That is, you have surrendered up your country to an enemy in time of war.

Now, this to me would be outside of the immunity. Now Senator Ervin did not think it would be. I think it would.

Chairman METCALF. Senator, let me give you a precise example.

In Montana we have a very great patriotic Senator. Senator Burton K. Wheeler. He was very much opposed to President Roosevelt's activities and our entering into World War II. He stood up on the floor of the U.S. Senate and said, "I have learned that despite the laws of the United States, President Roosevelt is at the present time sending

troops to England and they are on the high seas," and so those ships that were taking our troops, even before there was any declaration of war, were identified to the German submarines and therefore in danger of being attacked.

Now I think, very wisely, President Roosevelt did not do anything about charging treason, and perhaps I would agree with Senator Ervin that he had a right to say "This is what your President is doing to help you"; I did not agree with Senator Wheeler. But he had a right to say that.

Of course the people of the State of Montana were so concerned and outraged that in the next election they removed Senator Wheeler from any continuous service in the Senate.

But would that be treason?

Senator SAXBE. There again, I do not think that it fits. I think that would fit under Ervin's explanation rather than mine.

Now treason of the Benedict Arnold type, where he opened the back door, is of another type. What he was saying is that here is a President that is doing something that is specifically prohibited by this Congress.

Chairman METCALF. Or calculated to get us into war.

Senator SAXBE. And that it would fit under fair comment, under the interpretation of what the courts have held.

Chairman METCALF. Even though it would give aid and comfort to the enemy in the sense of identifying a target?

Senator SAXBE. And endangered the lives of men on those ships. But I think there is a fine line there. But the Benedict Arnold type of treason where an active participation is required, would be something that, first, would be extremely difficult to perform on the floor. So we are talking about it being done out here in the home State or afield someplace.

Senator GRAVEL. Would my colleague yield on that point?

Senator SAXBE. Yes.

Senator GRAVEL. Is not the fine line of division that of clandestine and open treatment of the matter?

Senator SAXBE. It could be.

Senator GRAVEL. In the case of Benedict Arnold, it was clandestine.

Senator SAXBE. It could be. But I think there would be times where open treatment such as in the way of scientific knowledge, taking the floor—if you would be permitted, and I doubt if you would be permitted—taking the floor and reading into the record a series of formulae having to do with how to make our latest nuclear weapon. I think then that—

Senator GRAVEL. In that case, would it not be apparent to all that read the formulae, which would not be understood by the general public or even fellow colleagues, would be just a ruse to make the information public?

Senator SAXBE. They could have said the same thing about your meeting, at midnight, with only you and a reporter, that it was a ruse to make this information known.

I think the difference in your case was that obviously the information was—classified and just was not that important. But suppose that it had been the formula for the latest nuclear weapon, that is where I think the difference would be.

Representative DELLENBACK. Or what if under the chairman's suggestion of the Wheeler situation, one, we had been at war, and two, the disclosures were of such a nature——

Chairman METCALF. Suppose a submarine had attacked those ships and there had been a death involved?

Senator SAXBE. Suppose he had given the location of the *Queen Mary* with 10,000 troops abroad, as later frequently happened in their dashes back and forth?

Representative DELLENBACK. But this was not clandestine.

Senator SAXBE. And it was sunk?

Representative DELLENBACK. If this were not clandestine, it could be treason?

Senator SAXBE. That is right. It does not have to be clandestine.

Representative DELLENBACK. In any event, we do not mean to usurp the Judiciary Committee. We see the complexity, the problems, we see the importance. We see some of the problems that at this stage enmesh the Congress as we seek, and I close with this, not to protect any one of us as an individual. Because if that is it, we have no business, Senators or House Members, doing this particular thing. But our only justification is the public interest better served by the House and Senate who have freedom from pressures without and within the Government to do what needs to be done for the body politic and for the public welfare.

Senator SAXBE. I think it is an extremely important area and what you are doing is very worthwhile.

Representative DELLENBACK. We appreciate your testimony very much.

Chairman METCALF. Senator Gravel?

Senator GRAVEL. I am very fascinated—I think you have made an outstanding contribution in this concept of breach of the peace. In reading over the Constitution, I see it somewhat differently than my colleague from——

Representative DELLENBACK. Do you have in part of your prepared statement a further definition of this breach of the peace and an extension of what you feel or have you treated it?

Senator SAXBE. No; I have not treated it in the statement. Just what I say here.

Representative DELLENBACK. I agree with your concept very strongly. I think therein lies the direction we should go.

Chairman METCALF. Senator Saxbe, I think not only this morning, but in your participation in the *Gravel* case, and the other case, you have acted in the highest tradition of the legal profession of the United States, to protect certain basic rights even though maybe we disagree with the way they are exercised. You have been very helpful this morning. We will look forward to continued advice and counsel from you as we consider this question.

Mr. SAXBE. Thank you.

Chairman METCALF. We are adjourned until the 27th.

[Whereupon, at 12:50 p.m., the committee adjourned, to reconvene March 27, 1973.]

THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND DISCLOSING INFORMATION

TUESDAY, MARCH 27, 1973

U.S. CONGRESS,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C.

The Joint Committee met, pursuant to notice, at 10 a.m., in room S-407, the Capitol, Hon. Lee Metcalf [chairman] presiding.

Present for the Senate: Senators Mike Gravel, Alaska and Jesse A. Helms, North Carolina.

Present for the House: Representatives Jack B. Brooks, Texas, vice chairman; James C. Cleveland, New Hampshire; and John Dellenback, Oregon.

Chairman METCALF. The committee will be in order.

Our first witness this morning is a very distinguished statesman. He has devoted a good deal of his time to many activities, as a lawyer, as Secretary of Labor, as a Justice of the Supreme Court, and as Ambassador to the United Nations. In all of these he has served with great distinction and with great ability. It is a great honor this morning, Justice Goldberg, to have you here to meet with you and have you discuss the very important and significant problems and programs that emanate from some of the recent decisions of the Supreme Court.

We are all concerned with the limitation of legislative activities as a result of these two decisions. We are especially interested because of your experience, not only as a practicing lawyer, but as a member of that Court.

Go right ahead.

STATEMENT OF ARTHUR J. GOLDBERG, FORMER SUPREME COURT JUSTICE

Mr. GOLDBERG. Thank you, Mr. Chairman, and members of the committee. With your permission, Mr. Chairman, I offer my statement for the record.

Chairman METCALF. It will be incorporated in the record and you may summarize.

Mr. GOLDBERG. That is what I propose to do, very briefly. First of all, I appreciate and welcome the opportunity to testify before this committee and commend the committee for giving attention to a matter of vital importance which reaches to the operations of our Government and to the greater principle of the separation of powers and checks and balances which have served us well and which, I regret to say, is today under challenge.

Mr. Chairman, Mr. Justice Holmes, shortly after his appointment to the Supreme Court of the United States, aptly said "Great cases like hard cases make bad law." (*Northern Securities Co. v. United States*, 193 U.S. 197, 400 [1904]).

This is a truism, but truisms, nevertheless, are true. The recent decisions of the Supreme Court in *Gravel v. United States*, 408 U.S. 606 (1972) and *United States v. Brewster*, 408 U.S. 501 (1972), are both great cases and bad law.

I say this with all respect for the Court. In a recent book I wrote on the Warren era of the Supreme Court "Equal Justice: The Warren Era of the Supreme Court. Northwestern University Press." I expressed agreement with a statement by my close friend and former colleague, the late Mr. Justice Black, that the Supreme Court is a "palladium of liberty" and a "citadel of justice."

I profoundly believe this and have not in any way changed my mind about the Supreme Court as a palladium of our liberties. This is not to say, however, that the Supreme Court is immune from criticism. No governmental institution in our democracy is so immune.

To show that this is not a recent attitude of mine, it is one that I expressed while I was on the Supreme Court. In 1963, during my tenure on the Court, I wrote an article for the New York Times Magazine based upon an address I gave at Georgetown University in which I had this to say about the decisions of the Supreme Court. If you will forgive me, I will quote myself:

I hasten to add . . . that our Court, along with every institution of democracy, is not immune to criticism of its actions. I agree with a New York Times editorial comment on this subject: "Unlimited public discussion is a primary safeguard of our democracy . . . The decisions of the Supreme Court are written by men on paper, not by gods in letters of fire across the sky. Critics may distort them. But the Court will have to trust the good sense of the people, just as the people trust the good sense of the Court." I trust the good sense of the people to recognize that although the Court is a proper subject of public comment and criticism, what should not be called into question is our allegiance as a nation and a people to government under law—for on this, as Judge Learned Hand once commented, we have truly staked our all.

As you will see, Mr. Chairman and gentlemen of the committee, I make a distinction between criticism of the Court, and, now that the Court has spoken, about observance of the rule of law.

In my opinion, the majority opinions of the Supreme Court in both Senator Gravel's case and Senator Brewster's case represent an unprecedented and undue narrowing of the scope of the legislative powers and the prerogatives of Congress.

I agree with the dissenting Justices in both cases. The criticism by Justice Brennan, in his dissent, in the *Gravel* case, seems to me to be compelling. This is the gravamen of his dissent:

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other Place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the republication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts

necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate." Ante, at 625. Therefore, "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Id.*, at 626.

Thus, the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103, U.S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins v. United States*, 354 U.S. 178 (1957). In speaking of the "power of the Congress to inquire into any publicize corruption, maladministration or inefficiency in agencies of the Government," the Court noted that "from the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature."

Justice Douglas similarly presented the case for congressional immunity in the *Gravel* case in wholly persuasive fashion.

I also regard Mr. Justice Brennan's dissenting opinion in the *Brewster* case to reflect the correct meaning and interpretation of the Constitution:

I yield nothing to the Court in conviction that this reprehensible and outrageous conduct, if committed by the Senator, should not have gone unpunished. But whether a court or only the Senate might undertake the task is a constitutional issue of portentous significance, which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. . . . We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior in the performance of legislative functions was accountable solely to a Member's own House and never to the executive or judiciary. The passing years have amply justified the wisdom of that judgment. It is the Court's duty to enforce the letter of the Speech or Debate Clause in that spirit. We did so in deciding *Johnson* (*United States v. Johnson*, 383 U. S. 169 [1966]). In turning its back on that decision today, the Court arrogates to the judiciary an authority committed by the Constitution, in Senator Brewster's case, exclusively to the Senate of the United States. Yet the Court provides no principled justification, and I can think of none, for its denial that *United States v. Johnson* compels affirmance of the District Court. That decision is only six years old and bears the indelible imprint of the distinguished constitutional scholar who wrote the opinion for the Court. *Johnson* surely merited a longer life.

I can summarize the dissents, I think, very simply. The problem involved is the independence of Congress and the necessity for Congress to perform its legislative duties free from restraint, coercion, or intimidation by the executive branch of the Government or even of undue scrutiny by the judicial branch of the Government. This is the essence of our constitutional provisions relating to the functioning of Congress. Congress, a coequal branch of the Government, is to be independent and not subject to matters which represent or potentially could represent pressure and coercion by the Congress on the part of other branches of Government.

You have already heard testimony from Senator Ervin and perhaps others on this subject. Judging by what I read in the newspapers, I am very much in agreement with what Senator Ervin had to say. But I would like to go beyond the criticism of the Court's opinions, which I share with them, to what I conceive now to be the question before Congress.

The Supreme Court has spoken and, as I have said earlier, as a man devoted to the rule of law and a former jurist, while reserving my right to criticize the Court's opinions in both cases, nevertheless, the decisions in *Gravel* and *Brewster* are the law of the land.

The question now recurs: What, if anything, can Congress do about these regrettable decisions? It is to this subject that I would like to address myself. The simple answer is that there is nothing in the Supreme Court's unduly narrow interpretation of the speech or debate clause in the *Gravel* and *Brewster* cases which precludes Congress from enacting appropriate legislation which will fully protect the legislative powers and prerogatives of Congress.

It is important to recognize that the majority of the Supreme Court in the *Gravel* and *Brewster* cases merely held that the Constitution itself, in their view, did not grant immunity to Members of Congress for activities defined by Congress by statute to be nonlegislative in character. Neither the majority nor minority Justices in any way expressed the view or implied that Congress may not constitutionally change existing law to immunize such activities as within the legislative scope.

It seems to have been forgotten by some commentators that both cases involved acts of Congress. The decisions, the majority and minority, in both cases, represented differing views as to the interpretation of these acts of Congress.

In describing the relative roles of the Court and the other departments of the Government, one must begin and end with a proposition fundamental to our system of government: the Constitution, as interpreted by the Court, is the supreme law of the land. Once the Supreme Court has decided that certain basic rights are constitutionally protected, these protections may not be diminished by any other department, Federal or State. But there is nothing in our system of government which precludes the other branches from applying the spirit of constitutional protections beyond what the Court has mandated. It cannot restrict constitutional protections, but Congress has the authority to expand constitutional protections. To quote Judge Learned Hand, the Constitution is "admonitory or hortatory." (L. Hand, the Bill of Rights 34; [Atheneum ed. 1964.]) What the Constitution does not command, it may still inspire.

There have been several decisions of the Supreme Court in recent times demonstrating this fact. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the literacy cases, the Court held that, in the process of more effectively enforcing rights, Congress may apply protections which the Court would not itself apply. Although the Court had previously declined to strike down voting literacy tests, *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959), it said in *Morgan* that the Congress may do so if its action is "plainly adapted to furthering the aims of the Equal Protection Clause" 384 U.S. at 652. Indeed, the *Morgan* Court went further to suggest that Congress may, under the fifth section of the 14th amendment decide that a particular practice itself constitutes a violation of the equal protection clause even though the Court has not yet done so. However, it added the proviso that Congress has "no power to restrict, abrogate, or dilute [existing] guarantees."

When I was on the Supreme Court, we had before us the case of *Bell v. Maryland*, 378 U.S. 226. That was a case that involved public accom-

modations under the equal protection clause. The Court was sharply divided on that question. I was of the opinion that the Constitution itself protected the right to equal accommodations. Three of my colleagues agreed with me; the others did not. However, in the next term, right after *Bell v. Maryland* was decided, the Court unanimously held, in *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, that a congressional statute, based on the commerce clause and section 5—the enforcement clause of the 14th amendment—guaranteed equal access to public accommodations to all persons and was an appropriate exercise of congressional powers.

The logic of these decisions, and other language of the Constitution itself, establish that Congress can enact a law shielding activities such as engaged in by Senator Gravel and his staff and limiting accountability of such acts as engaged in by Senator Brewster (which activities I in no way condone) to his own chamber.

Article 1, section 1, of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article 1, section 8, of the Constitution, in the necessary and proper clause, vests in Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It is these sections of the Constitution, together with article 1, section 6, both the arrest provision and the speech or debate provision, which clearly authorize Congress to enact carefully and properly drawn legislation to shield appropriate legislative activities—and to restrict accountability for congressional misconduct in discharging such legislative activities to Congress itself.

But there is even a more fundamental constitutional concept involved. The Congress has sole authority to enact the criminal laws of the United States. There are no common law offenses against the United States. Thus, to immunize activities such as those engaged in by Senator Gravel and in the case of Senator Brewster, to remit his actions to discipline by the Congress—is exclusive with Congress.

All of us know that Congress is currently considering legislation to provide and protect newspapermen in their right to protect their sources. So, I put a question which is self-answering: If Congress constitutionally can enact an immunity shield for newspapermen to protect their sources—a shield, by the way, which I support, if properly worded—can there be any doubt of its authority to enact appropriate congressional shield legislation? The answer is obvious to me and that is, Congress has the authority.

We must go beyond the matter of authority to the question of. Is it good public policy for Congress to do so? There, too, my answer is that it is very good public policy and, in fact, it is an important public policy to do so.

Both Congress and the press share the duty to inform the public about matters affecting the administration of Government. The duties of Congress go beyond informing the public. They extend to servicing of their constituents and the public at large. The press, in performing its duty, discharges its first amendment responsibilities; Congress, in

performing its duty, discharges its duty of considering and enacting legislation on acting as proper representatives of the citizens who elect them.

In enacting congressional immunity legislation, therefore—in other words, in changing existing law, which is what is involved—Congress both gives effect to the speech or debate clause of the Constitution and safeguards the concept of separation of powers, vital to the independent functioning of Congress as a coequal branch of Government. Here, as I said at the outset, Congress must be independent in discharging its duties. It cannot be independent if the laws of the United States unduly and narrowly restrict Congress in the performance of its legislative functions.

With due respect to the Supreme Court and the majority in the *Brewster* and *Gravel* cases, the majority opinions are completely unrealistic. The duties of Members of Congress and their obligations extend far beyond the question of making a speech or debating in the Chamber. The evidence of this is your presence here today: you are sitting in committee. That is not referred to by word in the Constitution, but who would doubt that a committee hearing, which is one of the developments which has characterized our system of Government and has reinforced its efficacy, is a legislative activity? Who can doubt that the problem of advising the public and informing the public on matters of public policy by Members of Congress, in and out of the Chambers and in and out of the committee rooms, is a legislative function? Today, one of our developments has been that most Members of Congress send letters to their constituents. Who can doubt that this is a legislative activity of prime importance? Who can doubt that when a Member of Congress appears on television, to report to the constituents and the public at large, that this is a legislative activity?

I mentioned earlier that I had written a book about the Warren Court. In this book I, in effect, respectfully agreed with my great Chief Justice Warren who said that the one-man-one-vote decision was the great accomplishment of the Warren Court. I said to him in person on one occasion, "I differ with you, Chief, with all respect. The greatest accomplishment of the Warren Court was injecting realism rather than fictions into the judicial process."

As I read the opinions of the Court in *Gravel* and *Brewster* I regarded them, again with great respect for the majority opinions, to be completely unrealistic and at variance with what legislative functions are today. Indeed, the Court itself, in many cases has pointed out that the great capacity of our Constitution—and this derives from the Chief Justice Marshall's opinion in *Marbury v. Madison*, is to develop to meet contingencies which the Founding Fathers could not have contemplated. One of the contingencies they could not have contemplated is the way Congress today must function in order properly to perform its legislative activities.

Fears were expressed in the Court opinions that obviously it would not be desirable to grant immunity to Members of Congress for actions which were nonlegislative in character. I am confident that Congress, in drafting a congressional shield law or immunity law or in redrafting existing legislation, can be relied upon not to confer upon its Members immunity for the exercise of what Congress knows to be nonlegislative powers or immunize Members of Congress for criminal

conduct unrelated to legislative activities realistically defined in a contemporary sense.

In conclusion, I wish to observe that one of the most important issues facing our country today is involved in these hearings. That issue is to check the erosion of congressional power and to preserve the system of checks and balances conceived by our Founding Fathers.

The decisions of the Supreme Court in Senator Gravel's and Senator Brewster's cases have eroded congressional power. They have made it more difficult for Congress to carry out its proper functions. But the remedy lies not just in criticizing the Supreme Court, but with Congress.

I would like to close, Mr. Chairman, by saying that it is both the responsibility and the duty of Congress, under the Constitution, to take appropriate action to restore to itself its capacity adequately to discharge its legislative functions. Now, I recognize, as a man who has had worldly experience, that this is not easy to do.

Senator Gravel, I am sure, would agree with me that what he did did not exactly arouse a strong storm of applause, but he was acting as a Senator, which he had a right to do, whether one approves or disapproves of Senator Gravel's conduct. I found nothing in what he did that violated the Constitution. In fact, I regarded what he did to be a protected legislative activity under the Constitution. Senator Brewster did things which I do not condone, but that is not the issue. What he did related to his votes in Congress. The issue in his case is which body, the courts or Congress, had the right to review these activities in order to determine whether or not they measured up to the standards of conduct that Congress should decide for its Members. My interpretation is that the sole judge of the propriety of his legislative activities is Congress.

We have great danger in this area of further eroding and emasculating Congress from the independent discharge of its duties. Therefore, I would hope that Congress, faced with this difficult problem, would address itself squarely to the subject. You are doing this Mr. Chairman and members of the Joint Committee and for this I commend you.

Chairman METCALF. I am very grateful to you, Justice Goldberg, for a splendid statement. I am especially grateful because it is a statement in which I largely concur. I regret that the Supreme Court of the United States has diminished the protection given to the Members of Congress by the Constitution.

I once served on a State appellate court and you served on the highest court of the land. I think each of us found that sometimes in our interpretation of statutes, or even of the Constitution, we issued an invitation to the legislative branch to make any corrections that were necessary in our interpretation, especially of statutes. As you pointed out, we have an interpretation of statutes involved in this case and an invitation for a correction. I think we would be derelict in our duties if we did not answer that invitation.

I especially liked the parallel that you have drawn with our efforts to give protection to the fourth estate, which has almost grown into another fourth branch of Government. We have given protection to the Court itself, which does not have any protection in the Constitution. A growing, perhaps too large, branch, in the executive community, has asserted executive privilege which has no protection in the

Constitution. I am very glad that you, as a very distinguished statesman and jurist, have come up here and told us that the thing to do is to make this correction for the benefit of the United States and the benefit of our own dignity, and that of the Congress of the United States.

Mr. GOLDBERG. Senator, in fact, the case for congressional immunity is the strongest case because there are explicit constitutional provisions shielding Congress in its legislative actions.

Chairman METCALF. The Founding Fathers saw fit to put these protections in the Constitution. In my opinion, in your opinion, and in the opinion of many people in the United States, those have been diminished and narrowed by too strict a construction of the Constitution.

Mr. GOLDBERG. I agree.

Chairman METCALF. We are not concerned today with an amendment to the Constitution, nor are we concerned with the change as a protest of the Supreme Court's decision. We are concerned with appropriate statutes and maybe an amendment to the criminal law.

Mr. GOLDBERG. Mr. Chairman, you will notice in my testimony I never referred to overruling the Supreme Court because both the majority and the minority opinions did not even intimate that Congress is not authorized to change the criminal laws to immunize the type of conduct they were dealing with.

Chairman METCALF. I think you made a very strong point in again emphasizing that there is no Federal criminal common law; it is all statute law.

Mr. GOLDBERG. In the Federal domain, there is no Federal common law offense. It all derives from statute.

Chairman METCALF. I know that my colleagues here have great interest. Congressman Dellenback, I don't think, differs too much with the basic premise, but he has some concern about the definitions and the parameters of the kind of definitions that we hand down. I am concerned too. I am going to have to excuse myself to participate in a roll call vote on the floor, and I know that Senator Gravel will have to also. I turn it over to my colleague and I want to express my very personal gratitude to you, Justice Goldberg, for your appearance and your help and your assistance and your guidance and your counsel and all of those things that are so important to our committee.

Mr. GOLDBERG. Thank you, Mr. Chairman.

Senator GRAVEL. Mr. Justice, I do want to thank you for taking your time and effort to put down your thoughts and add your wisdom to these deliberations. I read the statement. It is absolutely excellent. I have no questions on your statement, as I think it is very self-explanatory. However, I would ask: Have you given any consideration to the concept of executive privilege in your thinking and, if you have, would you share that with us?

Mr. GOLDBERG. Yes, I have, Senator Gravel. There is an area of executive privilege which must be respected, just as there is an area which we have talked about of congressional privilege. Congressional privilege, in my opinion, is much stronger than executive privilege because congressional privilege is founded upon express language in the Constitution. Executive privilege is implied from the nature of executive operations.

In my mind, the claims that are being made for executive privilege today, in relation particularly to the Congress' authority to discharge

its function, are too broad. There is executive privilege in these respects. Certainly the President and his staff are not to be called into question for communications between the President and his staff.

Indeed, in the Supreme Court decision, Senator, in the case you were involved in, the Court properly said that you and your staff are one and the same. However, there is no privilege, it seems to me, on matters that go beyond the relationship between the President and his staff: conversations and the business they do with each other, or the authorized functions performed by the staff for the President.

Now let me illustrate what I mean. Take the Watergate incident, which is very much in the press and in all of our minds. The President has said, and I have no reason to doubt his statement—I have seen no evidence to the contrary, thus far—that whatever occurred, he did not authorize it. If that is the case, and if people on his staff acted without authority, I cannot conceive that there is any privilege in relationship to authorized actions on their part.

In other words, Senator, putting it in your case, if I may use the analogy, if your staff acted on their own, they would not be entitled to protection that is accorded to a Senator for engaging in legislative activities. But if they operated under your authorization and direction, then, as the Court said, you are one and the same and therefore, in my opinion, in the context of what was involved in your situation, what your staff did were legislative activities that were protected activities.

Senator GRAVEL. Justice, what you are saying is that the noncomplicity opens up the area to nonprivilege.

Mr. GOLDBERG. Yes; I cannot see how there is any privilege for any member of the White House staff to refuse to testify before Congress about involvement in the Watergate situation where the President has said that the White House itself has no knowledge of any such actions and did not authorize any involvement. I do not see any privilege in that which would prevent Congress from calling members of the White House staff for inquiry, under these circumstances. The President has said that there was no authorized action in this area. If they acted on their own, where is the privilege? It is for this reason that I think that privilege has been asserted much too broadly.

I would protect the President broadly in his privilege to function, to carry on his activities, and to have confidential relations with members of his staff. If the President had said that what happened was authorized by him and that he directed what had been done, then I would support the privilege against testifying.

Senator GRAVEL. I must apologize. I must absent myself and I will return as soon as I can.

Representative Brooks [presiding]. Mr. Justice, it is delightful to see you again and visit with you after our long friendship. I do want to commend you on your statement. I was particularly impressed with the general thrust of it and especially the comments on page 6. There is nothing in the Supreme Court's unduly narrow interpretation of the speech or debate clause in the *Gravel* and *Brewster* cases which prevents Congress from enacting appropriate legislation which will fully protect the legislative powers and prerogatives of the Congress. I cannot think of a better way to state what is my own conviction as to this issue.

I note that on page 10 you also very carefully pointed out that you were confident that Congress, in drafting a congressional shield law, can be relied upon not to confer upon its Members immunity for the exercise of nonlegislative powers or to immunize Congressmen for criminal conduct unrelated to legislative activities realistically defined. I think that is an excellent statement. It is obvious, but it needs to be pointed out to the people who would allege that Congress is trying to exempt themselves from wrongdoing in any way.

Your conclusion that this is perhaps the most important problem facing our country today, that is, to check the erosion of congressional power to preserve the system of checks and balances conceived by our Founding Fathers, it is, I think, a beautiful statement of the fact that Congress, unless it takes some action now, is in effect, allowing the executive to distort the Constitution. This is going to be, as I pointed out this past weekend in some comments in my district, something that would have very dire consequences for this Nation.

I have a couple of questions that you might help us with, Mr. Justice. The Court has narrowly defined the legislative role of a Member and it has been noted that no justice now in the Court has had any legislative experience. Do you think that there is any lack of appreciation of the job of the responsibilities of Congressmen by the Court?

Mr. GOLDBERG. I cannot, of course, probe the mental operations of the Court. Even when I was there, I could not, except my own. I must say that I thought the majority did not sufficiently appreciate the role that Members of Congress play today, the duties they have, the broadened concept of what it requires adequately to perform legislative functions. I did not find the majority opinions, with all respect to them, realistic in light of the obligations and responsibilities of the Members of Congress. In that sense, I would agree with what you said. I thought the minority Justices were much more realistic in their appraisal of what congressional functions are today.

Representative BROOKS. Senator Ervin has introduced legislation which defines legislative activity basically in these terms: Any activity relating to the due functioning of the legislative process in carrying out the obligations a Member of Congress owes to the Congress and to his constituents. How broadly do you believe such official activities should be defined?

Mr. GOLDBERG. I would enlarge on that, with respect to Senator Ervin for whom I have the highest regard and who is to be commended on the role he is playing. I would add to that definition “. . . and to the public at large.”

Representative BROOKS. “. . . to the Congress and to his constituents and to the public at large”?

Mr. GOLDBERG. There are times when Congressmen have, to their great credit, have taken positions which their constituents have been against, but which Congressmen have felt are owing to the public at large. I would add to that “. . . to the public at large.”

Representative BROOKS. That would still be a very broad definition.

Mr. GOLDBERG. Yes, it is.

Representative BROOKS. You would retain a broad definition rather than item by item which would be limiting in effect?

Mr. GOLDBERG. Yes, it would be a great mistake to try and restrict the definition to specific, limited actions. I rather think you would want to follow what our Constitution itself does. The Constitution contains only 6,000 words. It has served us almost 200 years very well. In those 6,000 words there is the capacity for development to meet change and new conditions.

Representative Brooks. You know, Justice, what they always say: "anybody can write it long; it takes brains and work to write it short."

Mr. GOLDBERG. I agree.

Representative Brooks. I am afraid that is true of Congressmen as well as others. When Congress goes to court, we have the alternative of requesting representation by the Justice Department or of hiring private counsel on an ad hoc basis.

What do you think of Congress setting up some sort of a counsel's office for its own representation, as distinguished from requesting the help of the Justice Department?

Mr. GOLDBERG. I would think that this would be a very desirable development. This is not to say that the Justice Department in some instances, where the interests of the executive and the legislature are common and parallel, could not appropriately represent Congress. On the other hand, as is evident from this difference of opinion between the executive and the Congress, it would seem to me to be very helpful for Congress to have an office of counsel who could represent Congress in such situations.

Representative Brooks. Justice, the Ervin bill, S. 1314, the Congressional Free Speech Act, is limited to immunity for Members and aides in criminal proceedings. Do you think the purpose of the speech or debate clause is broader than for separation of powers?

Mr. GOLDBERG. I think it is.

Representative Brooks. Should a Member of Congress be forced to defend his legislative acts when challenged in a civil suit by an individual citizen alleging to have been harmed?

Mr. GOLDBERG. He should not be. In fact, there is Supreme Court doctrine which indicates that he should not be accountable in a civil proceeding for his functioning in the legislative sphere. The libel area, for example, would be a good example.

Representative Brooks. Thank you, Mr. Justice.

Mr. Cleveland?

Representative CLEVELAND. Thank you, Mr. Chairman.

We did not have these hearings on executive privilege, but of course everybody is interested in that and it is sort of a front burner issue right now. I was interested in your observations on executive privilege because, as I interpret your remarks to the committee, and I have read them and listened to them with much interest and indeed affirmation, I understood your position to be one that perhaps the Supreme Court had been perhaps too narrow in staking out the legislative shield or protection. I think that your description of executive privilege, as I understand it, is just as narrow as you have accused the Supreme Court of being in describing our privilege.

It seems to me that you pointed out in your remarks that the scope of legislative activity is broadening so much. Congressmen spend much of their time trying to help constituents with problems with the Federal Government and the agencies. Much of our activities are in the

committee room or outside of the House Chamber or the Senate Chamber. It seems to me that with the enormous expansion of the executive, to say the executive privilege, as I understood you to say, applies only to those things the President has precisely and definitely countenanced or ordered is somewhat unrealistic.

I do not think the President or any President can give every order in the Pentagon, every order in the Commerce Department or in the Agriculture Department, or even have knowledge of it. He has to delegate some of that authority. If your doctrine was to obtain, it would really be an extension of meaningful executive privilege. If I understood what you said, it was: "If he does not know about it and did not countenance it precisely, then there is no privilege."

Mr. GOLDBERG. Mr. Cleveland, I did not intend it in that sense. I believe the same broad test ought to be applied to the executive as to Congress. That is why I said I support executive privilege, but executive privilege properly defined, namely for executive activities. I certainly did not intimate that specific authorization was required for each action that the President's staff or members of the executive might do.

I served in the executive branch of the Government, as Secretary of Labor, and I operated under very broad authority, both from the President and acts of Congress, in the conduct of my department. I merely said this, and I used it only as an illustration; I said that where the President has said specifically or authorized a spokesman to say, "The activities which Congress is looking into never have been authorized by me in any form, directly or indirectly," I cannot concede the basis then for executive privilege any more than I would concede that the legislative privilege would extend to the staff of a Member of Congress if a Member of Congress were to say, "I gave no authority whatsoever, impliedly or expressly, to a member of my staff to engage in a certain type of activity."

That is what I meant to say and I welcome the opportunity to clarify it.

Representative CLEVELAND. Let me ask you this then. I do not serve in the Senate, but I have been told that in the Senate and particularly in some of the larger Senators' offices, a good deal of the mail that goes out over the Senator's signature is such that, in the nature of the amount of time required, he cannot actually sign it. He has to have trusted members of his staff who know something about his position. If a letter went out and a Senator has not actually seen or has not actually signed it, and this was one of these letters that might have the seeds of one of these suits that we are talking about in it, would he be protected?

Mr. GOLDBERG. Yes; he would be protected because, in my view, that would be a general authorization to his staff to address appropriate response to the communications that come into the office. I would apply the same rule to the executive. No executive officer, from the President to a Cabinet officer, can possibly handle his own mail. He must, by necessity, delegate it.

Representative CLEVELAND. If this Senator's letter came out and it was libelous and he was going to be sued for it, but he said "I did not authorize that letter and I did not sign it," he would still have the protection?

Mr. GOLDBERG. Yes; but the staff would not. The President is indeed entitled to the same protection. But again, I would go back to my formulation.

If a Member of Congress or the President, and you have to be even-handed in these things, would say specifically "You are not authorized to engage in this particular type of activity and no one is authorized and no one has been authorized by me to do so." I cannot see how in the executive case or in the congressional case, I cannot see how a privilege can be claimed for that totally unauthorized action.

Representative CLEVELAND. Of course, that leads us to the place where Congressman Dellenback was last week when we were talking to Senator Ervin about this problem. Along in here somewhere, you run into the problem of what you are going to do when somebody has acted illegally and we certainly do not want to shield us from illegal acts. We do not want to have an executive privilege that is going to shield executive people from illegal acts. There is a pretty fine line there.

I take it, by the way, there is no congressional law that actually spells out congressional privilege. Am I correct on that? I do not know of any myself.

Mr. GOLDBERG. No; as a matter of fact, the Supreme Court, as I have said, passed upon congressional enactments which in effect waived any privilege for Congressmen and the contest in the *Gravel* case and the *Brewster* case was not really over the Constitution, although constitutional interpretations were made, but over the question of whether Congress had passed laws which immunized those activities and the real decision of the Supreme Court majority was that congressional legislation did not immunize those activities.

That led me to the conclusion which I have stated, which I think no one can argue about: that since Congress passed the criminal laws of the United States, they can change that.

Representative CLEVELAND. Congress could then enact legislation in this field of executive privilege, could it not?

Mr. GOLDBERG. Yes; Congress can legislate. But Congress cannot violate the concept of the separation of powers because the executive authority is vested in the President and therefore Congress must respect the Constitution and the President's prerogatives. Therefore, like in Senator Ervin's bill on Congress, a properly drafted bill which does not violate the concept of separation of powers and the rights, duties, and prerogatives of the executive can be enacted. Congress enacts the laws of the United States. The first article of our Constitution so provides.

Representative CLEVELAND. Thank you very much, Mr. Justice. I want to again compliment you on your statement. I was particularly interested that you found a very telling analogy between the legislation that we are talking about in Senator Ervin's bill and the other efforts to enact shield legislation. You commented in your statement, and I found it very interesting, that you found the analogy there. There were some members of the committee that questioned the analogy and I am not sure that the analogy is as precise as you say it is. I think it would be, but I was very taken with that.

The only other comment I have is that in your comments you spoke as if the issue before us was whether the Congress, in these efforts

we are talking about, would discipline its Members or whether the courts would discipline its members. Of course, in addition to that, Members of Congress do have another discipline which is, for Congressmen, every 2 years and for Senators, every 6 years; we have to face our constituents.

MR. GOLDBERG. That is why I would give a very broad interpretation to the congressional immunity provisions of the Constitution because, I cannot conceive that Congress would be ready to give immunity for criminal actions by Members of Congress unrelated to legislative actions. As to misconduct in legislative areas, Congress should deal with them and Congress has done so in our history in terms of reviewing actions of particular Congressmen. And as you properly point out voters can pass judgment too upon the activities.

Representative CLEVELAND. I have never served on the Bench and I have never had the luxury of never having to face the public every so often. It must be a very comfortable feeling.

MR. GOLDBERG. It is. I have always said that the four words I miss the most, having left the Bench, are the words "It is so ordered."

Representative BROOKS. Congressman Dellenback?

Representative DELLENBACK. Thank you very much, Mr. Chairman.

MR. Chairman, I find this testimony very helpful. It is well reasoned, obviously, and marches along inexorably. But may I push for my own edification a little bit of this authority that is in us. The phrase that comes to my mind is the old proverb about confusing the intensity of the thirst with the quality of the drink. We know the real task for us is how to get there.

You outline in your testimony what you consider to be our power in the Congress to legislate in this area. First of all, as a preliminary to that, as we look at article 1, section 6, are you equating speech or debate with legislative activities so far as what we have the power to legislate on?

MR. GOLDBERG. No; I am not. You have the power to legislate broadly. The speech or debate clause of the Constitution is the question of accountability. Your legislation far transcends the question of accountability of Members of Congress for their actions.

Representative DELLENBACK. Does not the power to legislate in general, Mr. Justice, always tie back to the power? For example, you refer to article 1, section 1, which says "All legislative powers herein granted . . ." Does not that mean not a general grant of legislative authority, but a grant of authority to legislate if we find the general power somewhere else in the Constitution? Does not that also elude us? Is not that same thinking applicable to article 1, section 8, the necessary and proper clause, where again it is a case of the Congress having the power to do what is necessary and proper if you can find the power somewhere.

MR. GOLDBERG. I would define it this way. The Federal Government is a government of delegated powers and therefore the power of Congress to legislate, although plenary in character, is, of course, subject to the other restrictions in the Constitution. Therefore, acts of Congress can be and have been declared unconstitutional for violating constitutional provisions. For example, Congress cannot pass laws in derogation of the Bill of Rights.

There are many areas, even outside of the Bill of Rights, where this is so. The commerce clause is another example. Although the commerce clause has now been given very broad reach by decisions of the Supreme Court and by the development of the law, nevertheless the ambit of authority of Congress to regulate commerce is still the commerce clause.

Let me put a simple proposition that was contained in my testimony. Under article 1, Congress has the right to write the criminal codes of the United States. That is quite independent of the speech or debate provisions. There are no Federal common law offenses. Subject to constitutional limitations, and I think there are constitutional limitations on equal protection, Congress could—I cannot conceive that they would—say “Members of Congress are not to be prosecuted for kidnapping,” which is a Federal offense applicable to all other citizens.

Absent equal protection, Congress has a right to define the Federal crimes and presumably Congress could write such a law. I have grave doubts, under the equal protection clause of the Constitution, whether such a law would be constitutional, but it is in that sense that I spoke about the plenary authority of Congress to enact what are Federal crimes.

The *Gravel* and *Brewster* cases arose out of the fact that Congress itself enacted legislation which, in my view, did not give sufficient scope to its legislative activities and to its prerogatives of being the tribunal to consider misconduct relating to legislative activities. That is what I tried to convey.

Representative DELLENBACK. I think I understand that you are talking about article 1, section 1, and article 1, section 8, as powers that are given to the Congress to do that which is properly pertinent to the basic power which is to be found somewhere else. They are corollary powers to implement and supplement and carry out.

I am looking for that other power. I am still wanting to come to a conclusion and I need your help in walking my way through to it. If we look at article 1, section 5, as you refer to it, I find in article 1, section 5, only sections which deal with the power to be judge of qualifications of Members. Down in the second paragraph there are powers to punish for disorderly behavior. I am not sure that I find elsewhere in section 5 the basic power to which the corollary power would attach itself.

When we get down to article 1, section 6, we deal with the privilege from arrest clause and the speech or debate clause. I am not sure that I found in either of those references the basic power to which the corollary powers would attach.

Am I missing something at that stage, skipping for the moment the further point that you made about criminal laws?

Mr. GOLDBERG. I think, Congressman, in a certain sense, yes. I shall explain why, if I may, from my own viewpoint. Section 5 of article 1, the arrest clause, has been construed by the Supreme Court that it does not apply.

Representative DELLENBACK. Excuse me. You do not mean section 5; you mean the arrest clause under section 6.

Mr. GOLDBERG. Excuse me; section 6. It has been construed by the Supreme Court not to immunize Members of Congress from responding to certain types of subpoenas in certain types of matters.

Representative DELLENBACK. It is physical seizure.

Mr. GOLDBERG. I do not quarrel with that. However, on the speech or debate clause, there is perhaps where the problem really enters. I thought and I still think that this has been too narrowly and literally construed mechanistically. The words were taken too literally "... for any Speech or Debate in either House . . ." It was there that the Supreme Court majority made its mistake, in my opinion, with all respect.

There is a long line of decisions of the Supreme Court, dating from John Marshall's observation that it is the Constitution the court is construing; that is to say that one must read the statement in section 6 or in any other section of the Constitution not so literally that such a reading would defeat the purposes of what the section was intended to accomplish. Certainly, one must consider the statement in relation to the Constitution as a whole. It cannot be read in isolation.

That is why section 6, the speech or debate clause, in my view must be read in relation to section 1. In other words, the sections must be read and interpreted together. In reading and interpreting them together, I came to the conclusion that the dissenting Justices were right; that what was being called into question was the performance by Members of Congress of their legislative duties by criminal statutes which the executive has the right to enforce.

Let us be realistic about it. The purpose of the Constitution and the separation of powers concept is to preserve the independence of the various branches of Government: Congress, the President, and the Supreme Court. The executive controls prosecutions. All of us who have had experience in the law know that prosecutorial discretion enters into prosecutions. I do not criticize this; prosecutors cannot prosecute every crime. It is just physically impossible. Therefore, they must select the crimes for which they prosecute.

This is a great power. It is one that, in relation to Congress, is a power that must be narrowly scrutinized and applied in such a way so that Congress remains independent of unbridled prosecutorial discretion that might be directed against Congress. This would be a very dangerous thing. There is the necessity of giving not a narrow, but a broad construction to the provisions of the Constitution that protect the Congress in the performance of its legislative duties.

I am not implying by this that there was an abuse in an invidious sense of congressional prerogatives in the Brewster prosecution. I am not implying that. All I am saying is that we must guard against the potential of undermining the independence of Congress and the Constitution, I think, does provide that.

Representative DELLENBACK. Then, do I read you as saying two things, Mr. Justice. Do I read you as saying that really it is necessary for us if we are to move forward legislatively in the field to not accept the majority opinion in the *Gravel* and *Brewster* cases, which were a narrow mechanistic definition? If we are going to say, we have the power to legislate on the basis of blank, we must say that this is not the law. Having their opinions before us, however much we may quarrel with those opinions, are we not bound by that narrower definition until such time as the cases are reversed, if indeed that should happen.

That being the basic power to which article 1, section 1, attaches itself, it seems to me we therefore do not have the basic power that give us the independence that you plead for in connection with article 1, section 1.

Mr. GOLDBERG. No, Congressman. I do not conclude that and I shall say why. In the first place, I will want to again recall that the Court was dealing with acts of Congress. They were interpreting those acts of Congress. The challenge that was made in those cases was that while the acts of Congress cover this activity, the Constitution itself makes the acts of Congress unconstitutional. That was the issue before the Court.

The majority said that the acts of Congress were constitutional. The minority said that the acts of Congress were unconstitutional. I found nothing in the opinions which said that Congress could not change these laws by more broadly defining the Constitution even beyond what the Court might conceive a legislative duty was.

I cited the civil rights cases by way of analogy. The Court, looking at the 14th amendment, said, in *Bell v. Maryland*, that the 14th amendment itself did not safeguard the right to public accommodations. I was in disagreement; I thought it did. The Court said it and the Court's opinion is the law. But Congress then passed a civil rights statute under the commerce clause and the 14th amendment, section 5, which said that public accommodations are to be afforded to all citizens. The Court thereupon unanimously said yes, Congress had a right to do that.

I might cite another illustration: *Furman v. Georgia*, which I think is in the same volume as either the *Gravel* case or the *Brewster* case. There, the Chief Justice of the United States said in dissent that he was against the Court opinion, holding the death penalty under the circumstances there involved to be unconstitutional. He said that the cruel and unusual punishment clause of the Bill of Rights did not apply to the death penalty, but then he went on to say that this does not mean to say that Congress may not decide that the death penalty ought to be prohibited. Indeed, Congress could decide that on the basis that in Congress' conception of the Constitution an enlarged protection was warranted.

I added a caveat: Congress cannot cut down the rights of anybody, and that is a very important qualification. In other words, the Supreme Court, having said that the Constitution protects certain fundamental rights under the Bill of Rights, Congress could not say it does not. But, again, to quote Learned Hand, as I did, and the decisions of the Supreme Court itself, like *Morgan* and others, Congress may enlarge the area of protection.

I repeat: What the Constitution does not command, it may inspire. The Constitution inspires, and I believe commands complete independence of Congress free from any possibility of coercion by the executive or by anyone else. Congress may protect that independence.

That is what in effect, in the *Furman* case, the Chief Justice referred to; not in the congressional sense, but on the death penalty. What I am saying is that I have no doubt in my own mind that Congress may give a broad interpretation of legislative action in enacting a criminal statute penalizing nonlegislative activities of Members of

Congress. There cannot be even a scintilla of argument of Congress' right to do so, because Congress is the only source of authority to enact criminal laws for the United States. You are the only source. It may be wise or it may be unwise, but legally Congress is the only source of authority to enact the criminal laws of the United States.

Representative DELLENBACK. Is there, again, Mr. Justice, a specific phrase or clause of the Constitution that you are referring to when you talk about the power to enact criminal statutes? As you know and as we know, there is no common law in this field. Are you referring to the power that, again this time, we must find expressly in section 8?

Mr. GOLDBERG. Yes.

Representative DELLENBACK. We have to find one of the powers granted in article 1, section 8, to which then we have the power to add the corollary authority to deal with criminal law.

Mr. GOLDBERG. That is right.

Representative DELLENBACK. If that is the case, which of the specific powers in section 8 are we going to hang on to?

Mr. GOLDBERG. It is the necessary and proper clause to make laws.

Representative DELLENBACK. This is where I become uncertain. Unless we find a basic hard power to attach the article 1, section 1, or the article 1, section 8, powers to, I have trouble seeing article 1, section 1, and article 1, section 8, standing alone as a grant of power.

Mr. GOLDBERG. That, Congressman, first of all, has been so declared by the Supreme Court construing those two articles and has never been challenged at all as an appropriate interpretation of the Constitution.

Representative DELLENBACK. You mean, they stand alone and are not corollary to?

Mr. GOLDBERG. In conjunction: article 1 and section 1 and section 8 together have been the foundation for the Court opinions that Congress enacts the criminal laws of the United States and there is no basis for a common criminal law of the United States, unlike the States, which are quite different in this area.

I do not know, Mr. Chairman, whether in the library of this committee room there is Corwin's fundamental and classic book dealing with the Constitution. It was published under authority of the Congress. In that book, which is accepted as an authoritative account of constitutional doctrine, the language I used in my statement is stated.

Representative Brooks. Lawyers get literary license, too, Mr. Justice.

Mr. GOLDBERG. It relates, Congressman, to the nature of the Constitution. You cannot spell out, as I said earlier, in a document of 6,000 words every provision which relates to the activities of Congress.

Representative DELLENBACK. I am willing to broaden and eager to broaden article 1, section 1, and article 1, section 8. I think we must use those sections in a very broad sense as corollary powers, but I am having trouble with finding the basic authority. I am not quarreling a bit with what you say about the breadth of those powers, once you find that to which you are going to attach them.

I read you as saying one of two things, Mr. Justice: Either, that while you do not equate the speech or debate, article 1, section 1 phrase to legislative activities, it comes very close to that. It is a very broad phrase. It is not mechanistic and it is not to be considered in the light of two centuries ago, but is to be considered in the light of today.

Therefore, speech or debate does not mean standing up, saying a few words and sitting back down again. It means almost all the things that precede and follow after that speech.

Mr. GOLDBERG. What you are doing now, Congressman.

Representative DELLENBACK. And you referred to newsletters and prefatory conferences with staff, and so forth. So that what we are saying then is really: the basic power. Mr. Justice, that you use the corollaries to tie to is the speech or debate clause.

Mr. GOLDBERG. It is very important in this connection.

Representative DELLENBACK. I thought that this would be very helpful to me because I had not thought on it in those terms until I heard your testimony. Even when I go to the criminal laws, I have trouble again finding, not the power to enact the criminal statutes—because I see that again as the corollary power—but how the basic constituting of tribunals or dealing with coinage or these things which are clear can be interpreted broadly enough to allow us to pass laws expanding legislative immunity.

Mr. GOLDBERG. What fits is the general grant of legislative powers.

Representative DELLENBACK. Which again, without beating it any harder, must attach to something. I do not find that to which it attaches, unless you go back to speech or debate.

Mr. GOLDBERG. I disagree with you in this sense because now we are dealing with laws which transcend the speech or debate. I take it that you would agree with me that Congress has a right to enact a Federal criminal code, unrelated now to Congress.

Representative DELLENBACK. That derives from article 1, section 8?

Mr. GOLDBERG. That derives from article 1, section 8, and the Constitution as a whole.

Representative DELLENBACK. Is that under the general welfare?

Mr. GOLDBERG. It is under that; not the preambular general welfare, but the other general welfare language in the Constitution. There is the interstate commerce clause. Congress can enact, for example, a kidnaping and bank robbery statute, transcending State lines in a criminal statute, and can use the commerce clause to sustain that.

Now, why is it that the Court held that Congress may define as a Federal crime the robbing of a national bank? Where does this Federal crime derive from? The legislative power, plus the power to charter national banks; thus, Congress may make it a crime to rob a national bank.

But perhaps you and I are not different in this sense. In the final analysis, what I am saying and I think what you are saying is that one must read various sections of the Constitution together to come to the ultimate result of the power of Congress. That is why, when I said Congress has the power to enact criminal laws, it is only in the Federal domain that it has that power. I have not said that Congress has the power to enact criminal laws that are properly reserved to the States.

Representative DELLENBACK. Or which are not to be found among other delegated authorities, such as the Constitution?

Mr. GOLDBERG. The delegated authority derives from many sections of the Constitution and the nature of government, the Federal Government itself for example. Certainly, Congress has enacted a law to make the assassination of the President a Federal crime and, I guess,

other high-ranking Federal officials. I do not recall the exact language, but certainly it encompasses the assassination of the President.

There is no specific statement in the Constitution in that regard, but it is a necessary implication from the Constitution and the powers of Congress and the nature of our Government that Congress has the authority to make that a Federal crime. The President of the United States is our Chief Executive and, indeed, the legislation of Congress, as I remember it, goes much beyond the President to protecting other Federal officials in the exercise of their functions.

This is the virtue of our Constitution: That we do not interpret it as the Code Napoleon in France. There they would have to adopt a statutory provision which says, in their body of law, specifically from where that authority is derived. We operate under a 6,000-word Constitution, which has permitted "play in the joints" and has enabled us happily to survive to this date without a change in the Constitution and the Bill of Rights. We have never changed the Constitution in any structural sense, because it has the capacity for growth and development.

Representative DELLENBACK. May I just briefly ask two more questions. Mr. Justice: One, would you draw any distinction as to what, as a matter of public policy, perhaps we ought to do between the criminal actions relative to immunity or civil actions relative to immunity? Should we, as we legislate under whatever powers we do have, make a distinction in this regard?

Mr. GOLDBERG. I answered earlier that I think the essential issue involved here, as in many other areas, is the erosion of powers of Congress. I would support fully the protection of Members of Congress, both criminally and civilly, from accountability except by Congress itself for the discharge of their legislative functions broadly construed. I do not see how Congress can function otherwise. For Members of Congress, as I said earlier, to be subject to possible executive coercion, or even civil suits, in the performance of its legislative functions, would seem to me to have a chilling effect on Congress in the performance of its duties.

I would extend the privilege to protection from both criminal and civil actions. A civil action can be, in some respect, just as deleterious to a public officeholder as a criminal proceeding.

Representative DELLENBACK. Then you would be broad, walk both paths, and the key issue is not whether it be criminal or civil, the key issue as you see it is whether or not one can be called into account for that which one has done?

Mr. GOLDBERG. That is right. You can be called into account for misconduct in the performance of legislative acts before the Congress itself and that is the body; and for nonlegislative acts, you would be subject to the criminal laws anyhow.

Representative DELLENBACK. The last one that I would then ask you is a difficult one to phrase, to choose my words correctly. Do you feel that the record would bear out the thesis that the Congress can be relied upon to police its own ranks, if that is the result of our legislation?

Mr. GOLDBERG. I think the reason why I cannot give a full answer, although I express confidence that now Congress can, is that in the past what has happened in many other areas that Congress has, with

all respect to Congress, abrogated too many congressional powers and allowed the executive, whether in the criminal area or otherwise, to erode congressional powers.

I think that Congress could be relied upon to draft appropriate legislation to make sure that Congress is not immune from nonlegislative misconduct.

I cannot conceive, for example, even under the doctrine of pre-emption, that Congress would pass a law saying that since Congress is a Federal Congress its Members are free from prosecution under State law for murder. No Member of Congress would support such a law. If Members did, they would never be reelected. That is a check and balance too in our system. I am sure that today, since the issue now has really become, not the misconduct of a particular person as in the *Brewster* case, but really the authority of Congress and its prerogatives and its independence, Congress now can be relied upon carefully to develop laws to safeguard congressional independence and at the same time protect the public interest.

Representative DELLENBACK. Certainly we would fail in whatever we do in our responsibilities if we not only say that the courts do not have the power to make the judgment, if we stopped at that point, without also going on to provide who it would be, namely the Congress, that would have the responsibility of exercising judgment and of implementing that with proper statutes to make sure that it was done.

Mr. GOLDBERG. I agree entirely with that, for two reasons. First, you have existing laws which, in my opinion, the majority of the Supreme Court have held applicable and I would think that Congress must look into those laws and change them to protect Congress and at the same time to discharge its responsibility to the public to protect the public against congressional actions which are inimical to the public interest.

Representative DELLENBACK. I am grateful for your expression of qualified confidence. In the middle of your statement, when you were referring to the finality of the Court decision, I was reminded of Cardozo: "We are not final because we are infallible; we are infallible because we are final."

Mr. GOLDBERG. I said in 1963, when I was on the Court, that decisions of the Court are not immune from criticism. We are a democracy and no agency of the Government, the Executive, the Supreme Court, or Congress is immune from criticism. What we owe is adherence to the law. The Supreme Court having decided the *Gravel* and *Brewster* cases, we must comply with the law, but there is nothing in the Supreme Court decision which prevents Congress from now providing an appropriate shield for congressional activities. I think it is important that this be done to preserve the independence of Congress.

Representative DELLENBACK. Thank you very much, Mr. Justice.

Representative BROOKS. Thank you, Congressman.

Mr. Justice, we want to thank you for very graciously consenting to come down and convey to us your fine thoughts on this matter. We are deeply grateful to you. I must congratulate you on your good health and excellent appearance.

The next witness this morning was to have been Senator Gravel, but a very able and distinguished colleague, the chairman of the Senate

Foreign Relations Committee, William Fulbright, is here and I thought we should hear him now. He brings to the committee experience in law as an attorney with the Justice Department, as a professor at George Washington University, and, prior to his election to the Congress in 1942, as a president of the University of Arkansas.

Your continuing concern and efforts to insure that Congress has access to the information it needs to do its job qualifies you as an experienced spokesman on the issue before this committee. I want to say, on behalf of the committee, Senator, we welcome you here and we are grateful for your interest and your cooperation and help.

Chairman METCALF. Would the Senator yield to me for just a moment?

I certainly would concur in the welcome that Congressman Brooke has extended to you, Senator Fulbright.

At this time I wish to welcome to the committee our newest member, Senator Helms, who is taking the place of Senator Weicker.

We are delighted that you are here before the committee. In addition to the accolades that have been presented by the vice chairman, I want to concur in all of them and extend my personal gratification that you are here to testify.

STATEMENT OF HON. J. W. FULBRIGHT, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator FULBRIGHT. Thank you, Senator Metcalf. I wish to explain that I was told that I was to come here immediately after the votes on the treaties. I did not wish to interfere with Senator Gravel's appearance here. I thought this was the time I was expected to be here. In any case, I am very pleased to be here.

Mr. Chairman, I have prepared a written statement and, with your permission, I would like to read just a few paragraphs and insert the rest of it in the record. Some of it is repetitive of Senator Ervin's statement. I really do not know how you can improve upon Senator Ervin's presentation to this committee. I read it with great interest and I thoroughly associate myself with what he says. In the interests of saving time and hopefully to allow you to get to Senator Gravel, if it is all right with you I will ask consent to insert the statement as written and I will read just a few paragraphs to emphasize a few points and then we can have questions on whatever you wish. Is that agreeable?

Chairman METCALF. It will be inserted as if read. I want to say that, as superb as Senator Ervin's statement was, Justice Goldberg made an equally informative and helpful statement.

Senator FULBRIGHT. I am sure he did. I was given Senator Ervin's statement and read it yesterday with a great deal of interest and that is why I mentioned it. Much of mine is similar.

I do appreciate the opportunity to appear before the committee. I believe that this committee is doing a great service through these hearings by examining the legislative role of Congress in gathering and disclosing information, and I would like to begin by congratulating the committee for its initiative in bringing this matter to the attention of Congress and to the public.

Woodrow Wilson, in speaking of these functions, once noted that:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of administrative agents of the government, the country must be helpless to learn how it is being served: and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

The Court's decisions in the *Gravel* and *Brewster* cases represent a further attack upon the legislative responsibilities. They have impaired the constitutional prerogatives of every Member of Congress and of each body as a whole to carry out the public's business with candor and with independence.

In handing down these rulings, the High Court has, for the first time, placed a restrictive interpretation on the traditionally broad protection of legislative immunity afforded Members of Congress since the adoption of the Constitution. I share the view expressed by Senator Ervin to this committee that in doing so, the new majority on the Court has "tinkered with the very heart of the Constitution"—the doctrine of separation of powers between the coequal branches of Government.

Article 1 of the Constitution vests "All legislative powers" in the Congress of the United States, and includes section 6 which provides that "For any speech or debate in either House, they—the Senators and Representatives—shall not be questioned in any other place." This language is the constitutional basis for the doctrine of legislative immunity.

I think it is clear that the Founding Fathers, in writing this section into article 1, were seeking to insulate the legislative branch of the new Government from intimidation and harrassment by the executive and judicial branches. The legislative immunity incorporated in our Constitution is a product of the turbulent period of English history marked by the Glorious Revolution and the beheading of Charles I: and it is significant to note that the Founding Fathers chose to paraphrase a similar section dealing with this matter in the English bill of rights. The necessity they felt in providing the protection is evident from the fact that the section was unanimously adopted by the constitutional convention without debate.

Perhaps the most important aspect of their decision to protect the legislative branch in this manner is that they chose to accomplish the task by delegating to each body of Congress and, thus, to the legislative branch alone, the responsibility for policing its own ranks.

Article 1, section 5, states that, "Each House may determine the rules of its own proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member." As such, I believe the constitutional privilege of immunity conferred on Members was not given in terms of absolute immunity from responsibility, but rather, was related solely to the forum in which the Members should be held accountable.

This privilege of freedom from accountability in any other place, in conjunction with the duty of each House to discipline its membership, is essential to the effectiveness of each body as a deliberative lawmak-

ing group. My fear, Mr. Chairman, is that the Supreme Court in deciding the *Gravel* and *Brewster* cases has put these privileges in jeopardy and has exercised its power and responsibilities in a forum where it has no place. It is in this sense, more than any other, that the decisions represent an overt challenge to the Congress as a coequal branch of Government and constitute a further attack upon our rights and responsibilities as elected officials.

Prior to these cases, the judicial branch had dealt with the doctrine of legislative immunity in a manner entirely consistent with the doctrine of separation of powers. Courts, apparently recognizing the need for comity among the three branches of Government, were able to do this by exercising judicial restraint with respect to the speech or debate clause. In affirming a broad scope of legislative acts deemed to be included in the terms of the constitutional provision, the courts necessarily restrained themselves and chose not to enter the legislative arena nor extend their jurisdiction over the actions of Members immediately associated with the legislative process.

The foremost example of this is the Supreme Court's constant approval prior to *Gravel* and *Brewster* of the oft-quoted dictum of *Coffin v. Coffin*, an early Massachusetts case which sought to interpret the "full design" of legislative immunity. There it was said that:

. . . These privileges are thus secured, not with the intention of protecting members against the prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech or haranguing in debate: but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office . . .

For more than 150 years, this passage was cited as the landmark authority for a broad interpretation of the scope of the legislative privilege.

The essence of the problem which confronts Congress as a result of the *Gravel* and *Brewster* decisions is the narrow—and in terms of the precedent I have just noted—restrictive interpretation which the majority of the Court has now placed on the scope of protected legislative activities.

Under the language of these cases, the traditional boundaries have been cast aside, and the executive, through the Justice Department and grand juries, is now free to intervene and inquire into actions performed by a legislator in the normal course of his duties as long as there exists reason to believe that a crime was committed off the floor of Congress. The restricted interpretation of legislative immunity carries with it the potential for far-reaching inquiries of Members, and creates the possibility that the traditional independence of the legislative branch could be threatened through intimidation and harassment of its Members in certain instances. One need only note the similar fate which has befallen journalists since the Supreme Court stripped them of their immunity from prosecution for protecting confidential sources to realize the dimensions of the problem with which we are faced.

In *Gravel v. United States*, the Court chose for the first time to construe an investigative function of Congress as nonlegislative, holding

that the acquisition of information in preparation for a legislative hearing and the publication of the hearing thereafter was not within the ambit of protected activity.

In *United States v. Brewster*, the Court was concerned with the extent to which a Federal court could indirectly question a former Senator on concededly protected activity—the casting of a vote—without violating the speech or debate immunity. The decision reached was that even a protected activity such as voting can still be subject to inquiry by the courts or the executive branch in certain instances.

Mr. Chairman, the net result of these new precedents is that no legislator can now be certain of freedom from unwarranted scrutiny as he carries out the normal functions of his office. Each of us is now faced with the prospect that traditional functions such as gathering and publishing information in connection with investigations or the introduction of legislation can be called into question by the executive through grand jury proceedings.

Similarly, a Member's ability to inform those he represents about important matters before the Congress through newsletters, news releases, letters, and speeches at private functions is now subject to the same types of outside intervention.

Even voting and speaking on the floor could conceivably become the subject of a grand jury's inquiry if it can be shown that the mere possibility of an illegal act exists.

In sum then, I believe these decisions will have a "chilling effect" upon the individual Member's ability to adequately represent the people who elected him. As one writer recently put it:

... constituents will never know whether the threat of a suit has prevented a representative from criticizing executive action or revealing information about executive programs. By not giving legal recognition to the informing function performed by Congressmen [and Senators], the Court has arguably not only hindered the free flow of information to the public but has also unduly limited the information available to ... [them] ... to permit them to represent their constituents adequately.

I mentioned earlier that the *Gravel* and *Brewster* cases represented a further attack on legislative powers and responsibilities and I would like to put that notation into perspective before concluding.

What is involved here is the potential of a Member being subjected to intimidation by the threat of an indictment through grand jury proceedings brought by the Attorney General or his agents, all appointed, directly or indirectly, of the President of the United States. When I say "subjected to intimidation," I mean that in the broadest sense; not just that the Attorney General comes to a Member and says "If you don't behave, I will indict you." He does not have to do anything for the intimidation to be present, if we do not do something about it.

For that reason, I have joined Senator Ervin cosponsoring legislation dealing with this problem. I think this is one of the most important matters before us, to restore the proper balance provided for in the Constitution.

I have served in the Congress for over 30 years now, and during this period I have seen and participated in many of the great struggles between branches of Government. These are inevitable in my view and, indeed, necessary to the proper functioning of the checks and balances which are the mainstays of our constitutional system.

I do not recall, however, any struggle in the past which compares to the constitutional crises that exists today in terms of the eroding powers of the legislative branch, on the one hand, and the aggrandizement of power in the executive branch, on the other.

Three wars and a succession of major crises have caused serious domestic turmoil and disunity in this country, and have induced an atmosphere of apprehension and insecurity which, in turn, has resulted in a serious distortion in our constitutional system. The legislative branch, under these circumstances, has acquiesced in the usurpation of power by the executive to such an extent that some spokesmen for the executive branch have asserted that the Constitution is obsolete in many of its most fundamental aspects. This period has led to the acceptance of the executive as the primary power in our Government, to the point where it is going to be extremely difficult to restore the responsibilities in the role and function of the Congress.

The present imbalance has taken many forms: The impounding of congressional appropriations and the consequent abolition of legally enacted programs; the withholding of pertinent information by the executive branch under the guise of executive privilege; the increasing use of executive agreements and the corresponding demise of the Senate's advise and consent function; and the usurpation of Congress' exclusive powers to declare war.

I think this question of executive privilege, as recently stated by the President, goes far beyond anything that I have ever heard of in any connection in our history. Executive privilege is simply the assumption by the Executive, the President, that he is not really responsible to the Congress; that he is the primary and almost exclusive power in our political system. Part of executive privilege is the secrecy which accompanies it, that is the question of classification—the President's right to classify.

We have no Official Secrets Act in this country, yet the Government is bringing the Ellsberg suit in California today. The only purpose I can see for such action is to try to establish an Official Secrets Act by judicial decision. I do not believe such an act could be passed in the Congress, so the executive is attempting and pursuing a very long and a very expensive lawsuit trying to establish an "Official Secrets Act," as they call it in England, through the judicial process.

So the executive privilege question is now before the Congress.

The warring power is another example. The making of war by the President whenever he likes is contrary, in my opinion, to the Constitution, yet I read yesterday in the paper that the President has been bombing Cambodia for 19 straight days with B-52's. There is no declaration of war against Cambodia. There is no reason whatever that I can think of, certainly no constitutional reason, which authorizes him to conduct that extensive war.

Surely, we have not come to the point where the President, whenever he feels like it, can use B-52's to bomb anybody he likes, but he is doing it and he has been doing it. I heard on the radio this morning that he bombed so close to Phnom Penh yesterday that it shook the windows and the houses there.

Another example is intimidation of the press. This is all part and parcel, I think, of the drive of the executive branch of this Government to simply assume sole responsibility for the governing

power of the whole society. What is the significance of the intimidation of the press? It is not unlike executive privilege. If you cannot keep information from the Congress and the people, then by various ways keep the press from reporting or from criticizing anything the executive does.

This tactic has taken various forms. Not only are there very vicious attacks by the Vice President on the media, both the press and the television, but there is also the judicial process—that is, bringing actions in grand jury proceedings against members of the press. I think we have had more examples of this in the last 2 or 3 years than in the preceding 100 years. Several newsmen have even been incarcerated.

Now we have the *Brewster* and the *Gravel* cases. I do not know whether I can add anything to what has already been said about these decisions, and I will not belabor the point because you have already had two of the best witnesses I can think of. As I said in my opening remarks, I think the net result of those two cases is to make all Senators and Congressmen feel a certain apprehension if they venture to offer any criticism of the Executive. Having engaged in a degree of criticism in the past, I can see how this would be very frightening to some. You do not have to feel any sense of wrongdoing. It is a fact that you can be indicted. It never occurred to me during the past 30 years that I have been in Congress that I could be hauled up by a President who disagrees with me and accused of treason, for example.

Many writers, such as Mr. Alsop and others, have continuously stated or insinuated that I was betraying the country because I opposed the war. That is one thing. I was not very frightened by Mr. Alsop and there were many others like him—not many; there isn't anybody like him, not really, but there have been some who were similar. The absurdity of that kind of thing did not bother me very much. He has been so consistently wrong for 30 years. I did not think that any serious person would take that seriously.

But being subjected to criticism is a different thing from being hauled up before a grand jury and indicted as a traitor to your country. In this case members of the executive said I was a traitor because I opposed the war. Or take the *Gravel* case. All Senator Gravel was trying to do was to inform the public, using the means at his disposal. Actually, in my opinion, he was seeking to do the same as I was doing in different ways. We all have different ways of approaching these things.

I think this is extremely serious. If you put all these things I have mentioned, together with the enormous effect of the technological developments which have inevitably and irreversibly given the executive branch an enormous advantage over the Congress, I think you have a very serious question.

Only a few years ago, before the use of television, there was a certain equality between the capacity of the President to have access to the public mind and the legislature. The President's speeches, whatever he said, were filtered through the same press. There was a diversity of reporting by the reporters and by the editorial writers. We used to have a lot more newspapers than we do now. We have about 1,800 dailies today and I think there are 7,000 or 8,000 weeklies. It was not too long ago that we had 3,000 dailies, but that is another

matter. At least we had a reasonably fair access. Today there is no comparison.

A President, any time he likes, can go on prime time and project what he has to say into every living room in this country. There is nothing the Congress or a Congressman can do that approaches in any way his access to the people's minds. I am not sure that there is anything we can do to overcome the disadvantage that has developed through technological developments.

To conclude, Mr. Chairman, I think these matters are among the most important issues facing Congress if we still believe in the Constitution and in our system of government. If we do not, then we should be prepared to follow some of our most intimate allies and friends, such as the Greeks and the Spaniards and the Brazilians, who have already discarded this system. There are very few democratic systems left in the world today. I doubt if 25 percent of the world's population has a system comparable to ours, in which the people participate. So it is not a growing concept. We are fighting a rear guard action to keep it alive. I happen to be devoted to it and I think it is the best system, and that is why I am here to put my word in on behalf of the efforts of this committee to restore the constitutional system and the role of the Congress.

Without the Congress, it is no longer a constitutional system. It is just another authoritarian system under a different name. I do not like the idea of Congress being a front for a charade. I would not like to see Congress being used to make people believe we have a democratic system when we do not have it. That is why I am here, lending whatever voice I have to the efforts of this committee.

In the final analysis, Congress' ability to change these conditions and thereby arrest the decline of the legislative process must be prefaced upon a reassertion of the traditional scope of protection of legislative immunity provided in the Constitution. Such action has become, I believe, a necessary condition if we are to preserve and continue to exercise the powers and prerogatives vested in the legislative branch.

For this reason, I have joined Senator Ervin in sponsoring legislation which, through the powers vested in the Congress by article I of the Constitution, essentially reinstates the broad construction of legislative immunity that existed prior to the *Gravel* and *Brewster* decisions. In addition, this measure precludes inquiry, either directly or indirectly, of a Member or his aide, by a court or grand jury into a Member's protected legislative activity. I commend this bill to the committee, and once again express my appreciation for this opportunity to appear before you this morning.

Thank you, Mr. Chairman.

Chairman METCALF. Thank you, Senator Fulbright, for an eloquent and most persuasive statement. The fact that some of our members of the Joint Committee who are from the House of Representatives have left is not a derogation of your statement, but they have been called away and our vice chairman might have to be called away right away, so I am going to call on him for interrogation.

Representative BROOKS. Senator, I want to say that I am deeply grateful for your coming here today and I fully share your dedication to an independent Congress, independent in fact. I do not want

to be any window dressing for an Executive that runs the country with an iron hand by national television, whenever he wants it, by snapping his fingers. The technological disadvantage is tremendous.

I do remember some of your earlier activities and criticism of the President. When I knew the President very well, nobody even thought, even when he was mad at you, when you had just been giving him a fit, ever thought about calling the Attorney General and having him pick you up and haul you into court and challenge your right to say whatever you thought was true and whatever you wanted to say as a U.S. Senator. That thought never crossed the minds of anybody in the Johnson administration that I heard of or knew about, certainly not from him. I think it was a tribute to a dedication to our Constitution which he shared with you and which I share with you.

Senator, you are a cosponsor, along with our distinguished chairman, Senator Metcalf, of Senator Ervin's bill on legislative immunity. That bill is limited to the immunity of Members and aides in criminal proceedings. Do you think the purpose of the speech or debate clause is broader than that?

Senator FULBRIGHT. Yes; I think it is. I agree with what Mr. Justice Goldberg said. However, I think it may be wise to broaden it if the Congress is so disposed. While I would not object to expanding the bill, it makes it simpler to confine it to the criminal cases. I do not think the problem of civil suits is nearly as big a threat. It is not a part of this drive of the executive to dominate the Congress. It could be made that, but I have seen no tendency in this direction.

As you know, it is almost impossible to libel a public official under recent cases. I think the reverse is true: We have somewhat accepted the idea that the courts are likely to be very lenient on libel, that the public official may make almost any statement in defense, but I have not followed that too carefully. However, if it should be considered intimidation of the Legislature, if a number of cases were brought suing us for libel, it would certainly be a major problem. I think one of the reasons we did not go into this in the Ervin bill is that it simply is not a great problem at the moment.

Representative Brooks. Should a Member of Congress, Senator, be forced to defend his legislative act when challenged in a civil suit by a private citizen alleging to have been harmed by that action?

Senator FULBRIGHT. No; I do not think he should. I agree with Justice Goldberg on this question. If you are afraid to be sued and get a big judgment against you, you would think twice before you discharged what you believed to be your duty if it is a legislative act. So while I would agree with the problem in principle, I don't think you have to cure all the problems in one bill. I have no objection if our bill is amended to include a remedy for this situation, but I must say that I would be delighted if we could get the bill through as is. A measure of this nature, especially if the President vetoes it, is going to be mighty hard to pass.

I might say that I am a cosponsor and a sponsor of a number of bills along the lines I mentioned in my opening remarks. One is the executive privilege bill that I put in a year ago. I am not very optimistic about passing this measure or any others over a veto. I think our Congress, if it is really going to reassert its right to participate

in this Government, has to use its political powers with regard to the President. That is where our real opportunity to reestablish congressional roles lie.

However, I am supporting all of these bills for various reasons. Each is legislatively sound and ought to be passed, but when it comes to passing one over the veto of this President, you know it is going to be very difficult to get two-thirds. This is why I am playing both sides. I have greater confidence, I would say to Mr. Brooks, on the political aspect. By that, I mean, the sort of things we are trying to do in the Joint Committee on the Budget where we have a congressional budget and we really undertake definitely to reorder the priorities of this country and to deny to the President those perquisites which he has assumed are his by right. We do not think such perquisites are in the public interest.

Representative Brooks. You do feel that Congress has the responsibility for determining the priorities?

Senator FULBRIGHT. I sure do and it is the basic lawmaking body, if we abide by the Constitution. It is the same way on domestic matters as well as on making war. As I said a moment ago, I do not think the President has any constitutional right to be waging war on Cambodia today.

Representative Brooks. For 19 days he has been bombing them?

Senator FULBRIGHT. Nineteen straight days, with B-52's; that's what the papers said.

Chairman METCALE. Can you find out, as chairman of a great committee of the Senate, how many days he has been bombing and how much bombing there has been?

Senator FULBRIGHT. I think so. I think we could ask Mr. Rogers to come up and explain this bombing. My attention has been so riveted on the ITT case in my committee and the Watergate, and this sort of slipped by me. I had not even thought about bombing every day for 19 days until yesterday morning.

Chairman METCALE. But here there has been no denial of information?

Senator FULBRIGHT. No; I do not think there is any doubt about it, really.

Representative Brooks. Senator, do you see any problem with Congress legislating to define its immunity?

Senator FULBRIGHT. No problem, other than in the cooperation with the executive to pass a law which defines it. If the President does not veto our bill, I think we can do it. Are you talking about passing a law such as was involved in the *Brewster* case?

Representative Brooks. On your legislative immunity bill, do you feel we have the authority to pass such legislation to enact it?

Senator FULBRIGHT. Yes; and also to change our rule 30 in the Senate. One of the Ervin measures that I am cosponsoring would do this.

Representative Brooks. Do we narrow the scope of the constitutional language by doing so?

Senator FULBRIGHT. Narrow it only insofar as the Court has interpreted that language. That is what we are intending to do. For nearly 200 years, that language was all right. There is no real good precedent, in my view, for decisions in the *Gravel* and *Brewster* cases. The prec-

edents roll the other way. That is, a liberal or what you call a broad interpretation of what is legislative activity.

I think what we are trying to do is to correct the narrow interpretation of legislative activity by the Court in these cases. I think they went beyond a reasonable interpretation, just as I think the President did with the war powers. I am not very happy about that bill, frankly. What we are trying to do here is similar to what we are trying to do with the war powers bill—that is correct what I think is a misinterpretation by the President of the war powers provision. It has gone along all these years and nobody has challenged seriously that the Congress had the ultimate and real basic right to declare war.

The first serious challenge came in a formal way when former Attorney General Katzenbach, under the previous administration, came up to the committee and virtually said "The War Powers provisions are obsolete." They just changed the Constitution by saying it is obsolete, no longer applicable. I do not accept that way of changing the Constitution. So this forces us, at least inspires us, to try and correct the interpretation by the executive or the misinterpretation of the Constitution.

Another example is the newsman's privilege. I feel very apprehensive about these shield bills for the press. I expect I will vote for one, but I think it is too bad when the Congress has to correct these situations. Here again we are trying to correct what I call a misinterpretation by the Court of the first amendment, which seems to me quite clear, and up until quite recently we lived with it quite well without any bill. But what do you do under the impact of these new developments? I think the situations are all premised on the very sad assumption by the executive that the world is too complex now for the Constitution. They give you the impression that now with nuclear weapons, with all this complexity, they rationalize it to say "Well, the Constitution is obsolete. Just let us do it all. We will do it all." That is the way they would rationalize their conduct to themselves. I'm sure that they believe this is the best way to run the country.

I have no doubt that 90 percent of the people on the White House staff, and they have an enormous staff now, all honestly believe they are a lot smarter than Congress and that if you just leave it to them, everything would be fine. I think they believe that. I do not question their sincerity. I just question their judgment. I do not think it would be fine to leave everything to the National Security Council.

Representative BROOKS. Senator, I have two more quick questions. Would you limit in any way congressional access to information held by the executive branch?

Senator FULLERIGHT. Not in any way other than what I am willing to accept the idea of executive privilege as pertaining to the communications: not the persons, but the information, conversations, exchanges of views between the President, and any of his immediate observers.

I want to make it very clear that I do not believe that everybody who works in the White House is immune from supplying information. This is a complete distortion of the whole idea of executive privilege. There is nothing in the Constitution really that mentions executive privilege. The way I view it, I think it is simply in order for these three branches to cooperate. It will work only if each one has due respect for the other: If we recognize the other has a role to play.

Therefore, I think the Congress, in the interests of effective Government, ought to recognize that we should not try to obtain communications from the President to his advisors. That, I think, is a reasonable limitation, but when you go beyond that on the sort of thing we now have with Mr. Dean, it is absolutely absurd to say that this is under executive privilege.

Representative BROOKS. Would you limit the uses to which a Member of Congress may put information that he or she has?

Senator FULBRIGHT. I am not sure I get the impact of that question.

Representative BROOKS. Would you limit the use of information which a Member acquires as a Member of Congress or as a Member of the U.S. Senate?

Chairman METCALF. That is the *Gravel* case, Senator.

Senator FULBRIGHT. That is for public purposes, Senator. What crossed my mind was for his private enrichment or something along those lines. In the *Gravel* case, of course you would not limit it. In that case, I think Mr. Gravel was attempting to do the same as I was: To use whatever means came to him and he thought appropriate to enlighten the public and his colleagues so that we could find a way to end this very tragic and costly war. That was a legitimate purpose.

Chairman METCALF. Thank you very much. I am going to call on our newest member, Senator Helms.

Senator HELMS. Senator, first of all, let me say that there is a lady in North Carolina who taught you in high school in Arkansas and we have discussed you many times. I am impressed with your——

Senator FULBRIGHT. What is her name?

Senator HELMS. I am trying to think of it. This may be a matter of dismay to you, but she supported me last year.

Senator FULBRIGHT. It does not dismay me at all. I am a supporter of this institution and I think every community has a right to elect anybody they like; North Carolina or Arkansas, either one.

Chairman METCALF. Even Montana.

Senator FULBRIGHT. I do not object that you are a Republican.

Senator HELMS. We start out with a point of agreement on that. Let me review, if I may, some of the statements you made or I understood you to make. You referred to the vicious criticism of the news media by the Vice President. Do you think that the Vice President's comments were not justified?

Senator FULBRIGHT. I do not believe they were justified. They were generalized and on the media as a whole. If someone wants to object to what the media says about him as an individual, I sympathize with that. I have found it not to be very productive or useful, but I certainly sympathize. After I had done it a few times, I found it only inspired them to greater efforts, so I ceased doing it.

The Vice President is not a legislator. He is a member of the executive branch. With regard to the media, I mean the TV, they hold over the television industry this threat of denial of their licenses. It is a little like the threat of indictment to account. If you own a television station and they intimate that if you do not behave, if you do not have what they call "a balanced program," you may not get a renewal of your license. That is a power that the executive has. Everyone considers the Vice President as a spokesman for the executive branch. Although he is president of the Senate, his primary allegiance, I would say, is to

the executive branch. This could be interpreted, and I think was so interpreted, as a threat to the survival of the television.

On the newspapers, it took a different turn. That is, the indictment of the reporters themselves for not giving their sources. This was a little different approach. I do not think that the Vice President's attack on the newspapers, per se, would have any particular intimidating effect.

I believe that this drive has had an effect upon television.

Senator HELMS. I think I am correct in saying that I am the only former television executive in the Senate. It is interesting to me that we were investigated three times by the FCC in connection with our license during the Democratic administration and I must say that each time the facts were presented and we never felt that we were being intimidated.

Furthermore, I, for one, as a television man and now a U.S. Senator, think the Vice President was on target in his criticisms of the news media and we applauded him at the time and I applaud him now.

Senator FULBRIGHT. Of course, we all have our different views about the press. I do not approve of a lot of the press. Some of it spends its days attacking me and what I stand for. But I think that is part of our system and they are entitled to that.

Senator HELMS. That is exactly right.

Senator FULBRIGHT. But the Vice President is a member of the executive branch. We all took him to be speaking for the administration, which is quite a different thing from people who do not have that kind of power. I do not recall anybody in the previous administration making an attack upon the media comparable to the Vice President. The President himself used to attack me or individuals or maybe a certain particular reporter, but he did not say that television is prejudiced and if they do not come into line and in effect quit being critical of the administration he would see to it that they are disciplined. That was the feeling that the Vice President's statement left with the people.

This latest thing of Mr. Whitehead—Senator Ervin made a speech which was reported in this morning's paper about Mr. Whitehead. I think that has its effect. It is a subtle effect. Mr. Whitehead himself is a man that none of us knew anything about, but he is speaking for the administration. He is in the White House. To lay it on the line, that if you do not get in line with and be a little more what their view is of "more equitable, more balanced," they will take your license. I think it can be very effective.

Senator HELMS. I do not want to debate with you Senator, but I do not think Mr. Whitehead has said that. I am interested in being furnished, Mr. Chairman, with any documents or quotes by Mr. Whitehead in which he has said that or even implied that.

You said in your comments that there used to be a certain equality of legislative and executive branches in their exposure by the news media. Have you had any difficulty in gaining exposure from the news media?

Senator FULBRIGHT. I have been here 30 years. I do not recall that I was ever offered a half hour on Wednesday night at 9 o'clock at any time. The only time you are asked to do something is on a program like "Meet the Press," at a time when nearly everybody goes to church, in the middle of Sunday when they couldn't sell a program. The poorest

time. I guess, in the whole week is at 11:30 or 12 noon on Sunday. That is the only time you are really invited.

Senator HELMS. You are not interviewed on the evening news programs?

Senator FULBRIGHT. Rarely. What they do is sometimes come to the Foreign Relations Committee and as you come out of a meeting they will take a statement about it and there will be maybe 30 seconds or 10 seconds on a newscast. Do you think this is comparable to a President's appearance for 15, 20, or 30 minutes or whatever time he wants in prime time?

Senator HELMS. I am not suggesting that at all.

Senator FULBRIGHT. I would not say for a moment that they have never taken any notice of me or of other Senators, but it is so insignificant. You must remember this, Senator. I was trying to say that this is a technological thing. The President is not really responsible for this development. It simply is a development which is there. There are 535 Members of the Congress: 100 Senators and 435 Members of the House. We all have different views.

On many of these very programs you are talking about, there is one who says yes and one who says no. It takes a very studious and dedicated democratic citizen to figure out just what is the right thing. The President gets up with the aura of the leader of the country. This is a situation which I do not blame him for; it is just a fact of life and I think it accounts for a great deal of the shift of influence and power to the executive.

Maybe we cannot do anything about it. I think three-fourths is a good estimate of all the people in the world who are ruled by an authoritarian government. So I do not know why we think we are the chosen people: That God put his hands on us and we are going to be different from everybody else.

I just do not know whether we can preserve our system. This has no reflection upon the President or anybody else. It is simply a fact of life, growing out of the development of television. I put in a bill to say Congress should have equal time to the President, or at least some regular access to television. That is, they should make available to the Congress, both Houses, time comparable to the time which through experience we know has been made available to the executive.

We had hearings on it. Mr. Pastore was nice enough to have a hearing, but the networks did not particularly like it. They were afraid it would take more of their time and cost them more money. The chairman of the committee was puzzled about how the Congress would make use of it.

Just as a practical matter, who is going to speak for Congress? I said, let the Congress decide that. Let the Senate work out its own format for having somebody represent it. Maybe you would have two people, but let the Congress have some exposure. I would certainly like to see it given a try. It would not cost anybody that much. I did not expect them to choose me to be the spokesman, but the reason I wanted it was for the Congress. It would very likely be the leadership on most occasions. It would be healthy if the Congress had a more reasonable opportunity to have access to the public mind than it has. As it is, everybody looks to the President.

I hope, Senator, you do not think that I am being partisan about it. I would say the same thing to President Johnson, President Humphrey, or President anybody. I certainly do not blame this development upon this administration. The President cannot help it; that is the way it is. I do not blame him for asking for time.

Senator HELMS. You understand, I am not here to defend the administration. I am just trying to establish in my own mind an understanding that is satisfactory to me of what you are saying.

I thought I heard you to say that you had felt intimidation or threat. Would you care to describe specifically such intimidation or threat that you have felt personally?

Senator FULBRIGHT. I did not mean to say that I had been personally intimidated.

Senator HELMS. That is what I gathered.

Senator FULBRIGHT. I am sorry. I misspoke myself. I do not mean I had been intimidated.

Senator HELMS. So you, as a Senator, have felt nothing?

Senator FULBRIGHT. I must say, during these years when I was really in controversy with the President, if the *Brewster* case and the *Grand* case had already been handed down and I was conscious of the fact that I might be hauled up by the Attorney General or someone representing him and accused of treason, I might have had a very different attitude. But as Mr. Brooks said, all during this time, Congressman Brooks knows the situation with regards to my relations with President Johnson. I never had the feeling that I might be indicted for treason because of my criticism of the President—

Senator HELMS. Do you have that feeling now?

Senator FULBRIGHT. No, no; I am too old to be apprehensive about that. I have been here too long, in any case.

Senator HELMS. But you do not have that feeling now?

Senator FULBRIGHT. I can well imagine that if I was a young man starting out and I could see the implications of the *Brewster* case—after all, the *Brewster* case is just now coming to our consciousness. Under our system, where everybody takes contributions from their constituents and from some business and some private people, a case can easily be made similar to the *Brewster* case. Let us take my case, as an illustration. Among the biggest industries of my State are the poultry dealers. There are some large poultry companies. Or take the big rice people. In my State we are No. 1 in broilers, we are No. 2 in rice, and we are No. 3 in cotton.

I vote for those people. I try to advise with them. I expect 90 percent or 100 percent of my votes are in the interests of the broiler people, the cotton people, and the rice people. The people who are interested in rice contribute to my campaign. I do not know why.

If somebody in the Department of Justice felt I was a big enough nuisance, they would say, "Look, you got \$1,000 from such and such a rice company in Stuttgart and I notice you voted for their bill. You took that as a bribe." He does not have to prove it to put me in jail. The fact that I can be indicted and answerable in that forum is the significant part. I would not have to feel that I had been bribed or that I was guilty to be intimidated and be careful if somebody called me up and said, "Look, friend, you really are getting out of line. We know

you have \$1,000 from them. Now, you had better calm down a little bit or we are going to have to bring suit."

Senator HELMS. Have you ever known anybody that got a call like that?

Senator FULBRIGHT. No; the *Brewster* case has just been decided. We know Mr. Brewster has been answerable for a vote in the Senate and his reputation, I guess, is destroyed. In any event, that is a case and it has been considered. What we are concerned with are the implications of the *Brewster* and the *Gravel* cases. That is what this is all about. None of us were apprehensive about this aspect of it until those two cases.

Senator HELMS. I have one final question, Senator. I hope I have not offended you with this line of questions.

Senator FULBRIGHT. You have not offended me at all. I appreciate it because you are doing just what a Senator ought to do and that is to enable the Congress to discuss and to develop and to refine questions, whether they arise out of a case or a decision. It is just illustrating why I think the Congress has a proper role to play. These questions are not discussed in the executive, in my opinion, at all or very little. If they are discussed, it is just a matter of this person getting together with that person and one says, "I think we ought to be this." The other says, "Yes, I think so. How do we do it?" and that is the extent of the discussion.

You are not irritating me. On the contrary, you are doing exactly what, in my opinion, a good Senator ought to do and that is to raise questions and to debate with somebody who he thinks has a different view.

Senator HELMS. I do not think you meant to say this, but I think the record will show that you said that someone in the White House, one or more persons have said that the Constitution is obsolete. Is this just by implication, your interpretation?

Senator FULBRIGHT. No; I think I said that the late Attorney General Katzenbach, before my committee, said just that. I did not say anybody in the White House. If I did, maybe I was speaking too fast. I did not intend to attribute that to anybody in the White House now. Dean Acheson said just about the same thing too. He said that considerably before his incident.

What astounded me is that Mr. Katzenbach, after he had been Attorney General, came over while he was Under Secretary of State and testified before the Foreign Relations Committee. I was astounded when he in effect said that the war powers are obsolete; things have to move faster; we have such important things now in the executive, we cannot wait for Congress to act on these things. That is about what he said.

Senator HELMS. That was a question when Franklin Roosevelt was in office.

Senator FULBRIGHT. I think all executives tend to overreach themselves. I am a great believer in the thesis that George Reedy presented so well in his book about the Presidency. It is not just about this President or that President; they all are affected. Some of them I would sort of except. I might except President Eisenhower from this indictment because of special circumstances in his case, but I think all of them are inclined to get a bighead. As George Reedy put it, they

all get too big for their britches and they think that they alone know how and should have the right to run this country. That is what I am objecting to.

Senator HELMS. So that was a generalization over a period of a long time?

Senator FULBRIGHT. I certainly did not intend to say that someone in this White House has, because I do not know that one has. The thing I had specifically in mind was a statement of Mr. Katzenbach, although other people agreed with him. Many of the columnists and others agreed with him that the Congress is obsolete and we are just a bunch of boobs. That is a very common view around this city.

Senator HELMS. Thank you, Mr. Chairman.

Chairman METCALF. Thank you very much, Senators.

Senator Gravel?

Senator GRAVEL. I have no questions, Senator. I want to compliment you for coming.

Chairman METCALF. Senator, if you will bear with me a few minutes, I would like to ask you something. Let us get back to the main question of this hearing, which is the fact that we have before us two very recent decisions, the *Gravel* decision and the *Brewster* decision, which in many of our minds rather diminished the constitutional protection that we in the Congress thought we had.

Senator FULBRIGHT. I agree.

Chairman METCALF. The question is, what do we do about it? Largely, the decision of the Court was based on statute as well as on an interpretation of the Constitution. Don't you think that it is imperative that the Congress should assert its immunity at this time with the correction of that statute?

Senator FULBRIGHT. I do and I think it is timely. The bill that Senator Ervin introduced strikes me as being as good an approach as there is.

Chairman METCALF. But it is a minimum approach, isn't it?

Senator FULBRIGHT. It is a minimum approach. In fact, with the exception of civil actions, it is an effort to correct the present situation. I think it is constitutional and I hope it will be adopted and passed. I would hope the President does not veto it. I do not know what his attitude would be on it.

Chairman METCALF. Of course, there are other questions of immunity, a question that you suggested of executive privilege which is not covered in the Constitution. There is nothing in the Constitution?

Senator FULBRIGHT. No; there is nothing in the Constitution.

Chairman METCALF. That is an area that has grown up, not with this President although he has asserted it more than anybody else, but all Presidents have asserted some immunity as far as executives are concerned.

Senator FULBRIGHT. Maybe you can find an instance where it has been asserted in the way this President has attached to all the people in the White House. I had always thought the only valid concept is not to people, but to information, to communications between the President and somebody. This President, it seems to me, has completely changed the whole idea and extended it to hundreds of people. I had always thought of it as being restricted to Colonel House or somebody like that who was a private sort of counselor-advisor, not to mem-

bars of the Cabinet or to officials who are playing a part. But even to them, it was certainly not to go beyond the President's own talks, speeches, or writings. It only affects the information. The person cannot come and claim it. I am not sure the President himself, as a person, can. I believe in the old decision, and I think Senator Ervin had some reference to it as to subpoenas. The President is not a God. He is not completely above the law. We have respected this communication between the President and some of his advisers. This has nothing to do with the individuals. If the advisor is involved in an illegal action or some other private action, he does not have any immunity just because he happens to be in the White House. What is immune is not him as a person; it is what the President said to him and what he said to the President. That is the way I have always thought of it.

Chairman METCALF. I think Senator Helms wants me to yield.

Senator HELMS. Senator Fulbright, is there not some contradiction in your position in favor of the shield law for newsmen and what you have just said about the President having no immunity?

Senator FULBRIGHT. Newsmen, I thought, were protected by the first amendment. That is a provision of the Constitution. What provision of the Constitution applies to the President's immunity? Is there any?

Senator HELMS. I do not know.

Chairman METCALF. I do not know of any either.

Senator FULBRIGHT. I am basing this on the Constitution. We believe in the Constitution. I do. The first amendment protects the newsmen. The reason is not to protect the newsmen; it is to enable him, insofar as possible, to inform the public. It is for the benefit of the public. The newsmen is of no consequence in this connection. He is just like everybody else as far as due process, but he is singled out for this particular immunity because of his function of informing the public.

Jefferson was one of the first to say that if he had to choose between the Congress or the Government and free newspapers, insofar as the welfare of the public—and I am not quoting him exactly—they are essential to a democratic country. They all felt that. I think they are, with all their faults.

I hope the Senator does not think that I think the newsmen are perfect. I think they are some of the biggest scoundrels in the world, but by and large, they are essential to an informed electorate and as long as we have elections and we have a democratic system, they are important. I can understand it if you are not going to have a democracy. If you are going to go to the Greek system, you can abolish the newspapers; they have no role to play. In Saigon, they muzzle all the press; they don't want any newspapers. They are a nuisance to an authoritarian government and they ought to be abolished and they usually are.

But not our system. As long as we have our system, newspapers are essential and free newspapers, free of domination by the executive.

Chairman METCALF. The point I was trying to arrive at, Senator, is that here we have a challenge to the immunity of Congress as a result of a change of many of our understandings of the meaning of the Constitution and a limitation and a narrowing of the dimensions so far as Congress is concerned. We also have, as you pointed out, a challenge under the first amendment to newsmen and we have an

insistence from the executive department on a broadening of executive privilege.

Do you think that in this session of Congress we should recommend also legislation defining by statute executive privilege.

Senator FULBRIGHT. Oh, sure. I have introduced such a bill.

Chairman METCALF. And I cosponsored such legislation.

Senator FULBRIGHT. And Senator Ervin has already refined it in a further measure.

Chairman METCALF. So we have a broad sort of a program. We have to insist, in the public interest, you are saying, upon the immunity of Congress, not as individuals but as to the immunity of the institution?

Senator FULBRIGHT. It is the only way they can perform their functions.

Chairman METCALF. We have to insist on the first amendment on the immunity of the news gathering; not for individuals, some of whom we applaud and some of whom we disapprove.

Senator FULBRIGHT. That is true.

Chairman METCALF. It is the institution. Then we should define and circumscribe the so-called executive privilege to enclose it within what should be a balance between the separate powers.

Senator FULBRIGHT. Legislation is the proper way to do it. We may not be able to do it, but Congress will have to eventually try it and it may end up in the judiciary, the courts. The President suggested that we challenge his executive privilege in the courts.

Chairman METCALF. I would hate to be a part of a confrontation between the various powers, the judicial and the executive. I would hope that men of good will, downtown in the White House at the end of Pennsylvania Avenue and over across the street in the Supreme Court building, can work this thing out without one of these classic confrontations.

Senator FULBRIGHT. I agree and that is why I support the legislation and introduce it. That is the orderly way to do it. I hope they would accept it and not veto it.

Chairman METCALF. It seems to me that the Supreme Court in its *Gravel* decision and in the decision in the *Brewster* case invited the Congress to pass legislation that was necessary to make definitions of our prerogative.

Senator FULBRIGHT. I think that is partly it. I agree with Senator Ervin's observation that none of those men ever had any experience in the legislative body and their narrow interpretation of what is legislative activity is due to their lack of knowledge rather than anything else, not because they wanted to undermine Congress in the things we have to do. I think we have to do them to make this system function. Many of the things they called "errands" and doing things for constituents. They seem to have a very supercilious attitude toward this, but this is part and parcel of the whole system. We are supposed to be useful to constituents; that is what we are here for. The people in a small State like mine, for example: Why should they be devoted to this system unless we did serve them?

They cannot expect to go down to the White House and say, "Hello. Mr. President. How are you. How about getting me this and that?" Of course, nobody can see the President that he does not want to see. It always amuses me, this idea that this President is burdened as he is by

these awesome responsibilities which certain columnists talk about. There is nobody in the world more protected than the President, from everybody. He goes off to San Clemente or to Biscayne Bay with just one person or two; nobody to bother him. He does not have constituents piling in on his office and saying, "How about doing this or that."

But that is what we are supposed to do and the Court takes the view that it is not legislative in character and therefore not protected.

Chairman METCALF. The whole point is that we who are legislators and who are experienced and know the responsibilities of our office have a responsibility to define what is legislative activity so that the next time the Court considers the question, they will understand it from the statute.

Senator FULBRIGHT. I am for it and I applaud the chairman for deciding that and this committee for supporting it.

Chairman METCALF. I hope that this committee will come out with a recommendation such as that.

Senator FULBRIGHT. I do. I cannot imagine that it would not turn out, with the chairman's guidance, to be a good recommendation, in my opinion.

Chairman METCALF. Thank you.

Senator GRAVEL. I would just like to pursue one matter. I beg your indulgence because of the lateness of the hour. There is a fundamental point, and you raised it in discussion with respect to executive privilege. I have legislation that has not been introduced, but which I sent to you, Senator, for your perusal. I do not know whether you have had time to study it—I appreciate that you have had other exigencies.

The conceptual difference between legislation you have introduced with respect to executive privilege and that which I have proposed pertains to the Office of the President itself. I agree entirely with you that the issue goes to the information, not to the individuals in question. But the point of departure, and I believe it could be my misunderstanding of the legislation you have introduced, is that the President can grant this immunity or this mantle of executive privilege to those he chooses to grant it to, as in the case of Mr. Dean right now.

I hold, in my proposal, that even the President himself cannot withhold that information from the Congress, and the Congress should be able to address itself to the President, because he is the executive and the implementer of policy. Of course, this is the fine point: Whether or not we hold the President above all of this because it is from his mantle that all of the rest of the privilege stems. This could be a flaw in the whole concept of executive privilege. Either we include him or not.

Senator FULBRIGHT. I think you relate to the question of who is the final arbiter of whether it is properly asserted or not. I think my bill leaves that to the Congress. He asserts such and such information. A communication is entitled to immunity. In my bill, we do not accept that as *carte blanche*. He just cannot do it to any and everything. Then it is for the Congress to determine whether it is properly asserted or not.

Senator GRAVEL. How would that be done?

Senator FULBRIGHT. By a decision of the Congress. How do we ever decide anything? First in the committee and then it is submitted to the Senate as to whether or not a subpoena should be issued. That

would be the ultimate for nearly all. How does the Congress decide once you do get to the point of a confrontation. It finally has to be decided by the Senate.

Chairman METCALF. It could be ultimately decided on the floor of the Senate by a roll call vote.

Senator FULBRIGHT. Yes; that is the ultimate way.

Senator GRAVEL. Then we agree.

Chairman METCALF. Thank you very much, Senator. I know we kept you too long.

Without objection, I want to submit the amicus curiae brief in the *Gravel* case, which was filed by a group of distinguished colleagues, to be made a part of the record.

Senator Gravel, who has been scheduled twice to be heard, has kindly said that he will postpone his appearance. So we will hear Senator Gravel tomorrow.

We will be in recess right now until 10 o'clock tomorrow morning. Thank you all.

[Whereupon, at 12:45 p.m., the hearing recessed, to reconvene at 10 a.m., Wednesday, March 28, 1973.]

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1026

UNITED STATES OF AMERICA,

Petitioner

v.

MIKE GRAVEL, United States Senator,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED
 STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SENATE OF UNITED STATES

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Amicus Curiae

The Senate of the United States hereby appears as *amicus curiae* pursuant to Senate Resolution No. 280* and with the consent of the Solicitor General of the United States and Senator Gravel. Copies of the letters of consent have been filed with the Clerk's Office.

INTEREST OF THE AMICUS CURIAE

In light of the questions presented, which directly concern the scope and validity of the constitutional privilege created by the "Speech or Debate" Clause of the United States

*The Resolution appears as Appendix A hereto.

Constitution, Art. I, § 6, the interest of the United States Senate in this litigation hardly needs explication.

OPINIONS BELOW

The opinions of the Court of Appeals for the First Circuit are not yet reported. They are reproduced as Appendices A and B to the Government's petition for certiorari. The opinion of the District Court is reported at 322 F. Supp. 930.

JURISDICTION

The petitions for certiorari were timely filed. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can a Senator be questioned by a grand jury about his legislative conduct despite the prohibition of the "Speech or Debate" Clause against questioning in any other place?
2. Can a Senatorial aide be questioned by a grand jury about his or his Senator's legislative conduct, where there is no issue of the constitutionality of that conduct, despite the prohibition of the Speech or Debate clause against questioning in any other place?

CONSTITUTIONAL PROVISIONS INVOLVED

The "Speech or Debate" Clause of the Constitution, Art. I, § 6 provides:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.* (Emphasis added.)

STATEMENT

In a very important sense, this is not an ordinary brief *amicus curiae*. It is rather a statement by a coordinate branch of the United States Government of that branch's understanding of the meaning of the Constitution of the United States, a Constitution which, like each member of this Court, each member of the Senate has sworn to uphold. In its nature, the brief is in fact testimonial as well as forensic.

The purpose of this brief is to establish the position of the United States Senate that the attempt to subpoena an aide to a Senator to testify before a grand jury as to his activities and those of the Senator whom he serves is an invasion of the Senate's constitutional privilege. Art. I, § 6. It is the contention here advanced that this position ought to be accepted by this Court be reason of the comity due to a coequal branch in the determination of the protections it needs to fulfill the functions with which it is charged. Only if this Court is unwilling, as a matter of comity, to accept the authority of the Senate in its own sphere, need it turn to the history and authority which also establish the propriety of the conclusion here asserted.

In part because of the nature of this brief, and in part because the materials are elaborately collected in the other briefs, it is not intended here to provide a detailed study of the origins and development of the Congressional privilege to operate free from the restraints of both the Executive and Judicial branches. It is the purpose, rather, to assert the basic principles on which the outcome of this case must rest.

In short, this brief is filed on behalf of the Congressional privilege. It is not a defense of Senator Gravel or his aide, nor is it a defense of their conduct in this case. If there were misconduct on their part, they must answer to the Senate itself. Discipline of its own membership is a function committed by the Constitution to each House. Art. I, § 5.

Nor is this brief an attack on the present administration, the President, or the Department of Justice.

In filing this brief, the Senate does not seek a confrontation with either the Executive or the Judiciary. The Senate recognizes that if the three Branches are to function in comity, such confrontations must be limited to those extreme situations where confrontation cannot be avoided. Here the confrontation is forced upon the Senate, and upon the Judiciary, by the insistence of the Executive that the Senate's privilege be limited. The facts of this case are not of sufficient importance to warrant a test of the privilege, nor to require the Judiciary to insert itself between the Executive and the Legislative Branches.

As far as this case is concerned, neither Senator Gravel nor his aide can be reached by the Grand Jury under the opinion of the Court of Appeals. A complete vindication by this Court of the Congressional privilege, much as it is desired by the Senate, would not immunize them any more.

Similarly, this is not a case of such importance to the Executive Branch to warrant a constitutional confrontation, and it is certainly not of such importance to the Executive to warrant an erosion of the Congressional privilege. In context, these Grand Jury proceedings are of little long-run significance compared to the crucial, historical importance of the "Speech or Debate" Clause to the continued vitality of the Congress. There is no need to comment here upon the principal actors in the Pentagon Papers affair: the *New York Times*, Mr. Ellsberg, and others. Their cases are properly in court and the fundamental issues, if any are involved, can be determined in their cases. The crimes suggested by the Solicitor General— retention of public property or records with intent to convert, gathering and transmitting of national defense information, concealment or removal of public records or documents and conspiracy to commit such offenses and to defraud the United States—are by their nature readily provable, if committed, without reference to any involvement of Senator Gravel or his aide. There is no compelling reason of public policy to limit the Congressional privilege in order to make this prosecution easier, even if, in fact, it would do so.

The Solicitor General suggests dire consequences to the functioning of the Grand Jury if Senatorial aides and others cannot be questioned about legislative activities of a member of Congress (Government Question 1) or if an aide may not be questioned about private publication of material introduced by his Senator-employer into a subcommittee record (Government Question 2). Made by anyone but the Solicitor General, the suggestion would not be seriously considered. For if the activities are protected, as Question 1 assumes, they should be beyond inquiry. And if there has been publication—and if publication itself is not protected—the problems of proof for the Government are not so great that an aide of a Senator should be subject to interrogation by the Executive's Grand Jury, when admittedly the Senator could not be. Indeed, if all Congressmen and all of their aides had absolute immunity under all circumstances, a position not here urged, it is difficult to imagine that this would have any substantial effect, or any effect, on the overall administration of justice. It is even more difficult to imagine that it would make any significant difference in this case. The questions raised by the conflict between the Executive and the Senate are serious; the questions raised by the Solicitor General are not.

This is a poor case to test the great constitutional issues involved. The Court might best decide to dismiss the the Solicitor General's petition as improvidently granted.

It is important to note that no question is here raised as to whether or not Dr. Rodberg was an aide of Senator Gravel, nor whether the hearing of the Subcommittee on Public Buildings and Grounds, at which Senator Gravel published classified documents was or was not properly called, nor whether such Subcommittee had legislative jurisdiction over the subject matter of the publication. These determinations would historically remain subject to the judgment of the Senate.

ARGUMENT

The protection of the "Speech or Debate" Clause is not a perquisite of office. Its purpose is not to immunize Members as a reward to them. Its purpose is to enable them to perform to the fullest, without obstacle or harassment, the duties of their offices. One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspapers reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use. It is not for the Executive to challenge nor for the Judiciary to judge a Member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised. The Senate as a whole may or may not approve the exercise of the privilege by Senator Gravel in this case. But it joins in Senator Gravel's assertion of the privilege.

Neither the Executive nor the Judiciary can determine the extent of Congressional privilege if "separation of powers" is to retain its function. The Constitution says that Senators and Representatives shall not be questioned in any other place for any speech or debate. It does not say "except when the Executive thinks otherwise and the Judiciary agrees." The very purpose of the privilege is to insulate the Congress from just such scrutiny and determination. Senator Gravel made a record in the Senate and arranged for its publication. If his privilege to do so is subject to challenge by the Executive and determination by the Judiciary, the Congressional privilege is all but dissipated.

I. THE ORIGINS OF THE "SPEECH OR DEBATE" CLAUSE

"It was not only fear of the Executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, levying punishments more to the wishes of the crown than to the gravity of the offense

There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the Executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation powers, is the predominate thrust of the Speech or Debate Clause." *United States v. Johnson*, 383 U.S. 169, 181-82 (1965).

The origins and purpose of the "Speech or Debate" Clause are patent. This provision, like many others in the Constitution, was a specific remedy for a specific evil. The evil was harassment by the Crown and its judges of legislators who spoke out in the course of their legislative duties on public issues in a manner not pleasing to the king.

When the "Speech and Debate" Clause is the measure of the rights of the legislature, as it is here, the history of the legislative immunity is especially important. The immunity was finally gained by Parliament only after Charles I had lost his head. And he lost his head, in measure, because he imprisoned members of Parliament who had opposed him in needless and costly overseas wars, even to the extent of refusing to vote him the funds necessary to carry them on. The establishment of the legislative privilege came during the fight by Parliament to establish its independence from a king who claimed total power.

As this Court said in *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951):

" In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious'

speech in Parliament In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debate or proceeding in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' 1 Wm. & Mary Sess. 2, Ch. 2.

"Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. . . .

"The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however, powerful, to whom the exercise of that liberty may occasion offence.' II Works of James Wilson (Andrews ed. 1896) 38."

It was understood from the beginning that provisions of this kind were to be construed broadly, that the protection was not to be niggardly but expansive, if it were to serve the function that caused its creation. See *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), cited with approval in *Tenney v. Brandhove*, *supra*, at 373. At the core was always the recognition that the immediate and historic sources of danger to the independence of the legislature—the representatives of the people—was the Executive branch of the government. The provision is a cornerstone of the concept of separation of powers, an assurance of legislative independence similar to the protection of life tenure afforded by the Constitution to the Judiciary, and the rigid rules protecting the President against impeachment also provided by the Constitution. Thus, the Court said, in *Powell v. McCormack*, 395 U.S. 486, 502-03:

“... we concluded in *United States v. Johnson*, [383 U.S. 169] at 181, that the purpose of this clause was ‘to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.’ ... we have held that it would be a ‘narrow view’ to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are ‘things generally done in a session of the House by one of its members in relation to the business before it.’ *Kilbourn v. Thompson*, [103 U.S. 168] at 204. Furthermore, the clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself. *Dombrowski v. Eastland*, [387 U.S. 82] at 580; see *Tenney v. Brandhove*, *supra*, at 377.”

It is of some importance to emphasize a distinction of which this Court has taken appropriate notice, the distinction between the privilege against actions taken by the Executive branch of the government, which is involved in this case, and the privilege as asserted against individual action, which is not involved here. This Court said in *United States v. Johnson*, 383 U.S. 169, at 180-81: “Even though no English or American case casts bright light on the one before us, it is apparent from the history of the clause that the privilege was not born primarily to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile jury.” It is exactly the latter and not the former proposition that grounds the position asserted here by the Senate of the United States.

The purpose of the “Speech or Debate” Clause—to protect the independence of the Legislative branch from incursions by the Executive—would be seriously eroded if the Court were to retreat from the standards it has heretofore announced. An independent legislature—one in which the legislators are responsible for their actions to their constituents and to the body of which they are members—must be as important to

the governance of a free people as the independence of the Judiciary and the independence of the Executive.

In Great Britain, where the horrible experiences occurred that gave rise to the inclusion of the Speech or Debate Clause in our Constitution, it is the legislature itself that makes a determination whether the privilege is breached by threatened executive action. Thus, in 1938, in the case of Duncan Sandys, it was the House of Commons that decided that it was a breach of privilege to attempt to require a member of Parliament to divulge to a court of inquiry his source of information about anti-aircraft defenses which he published in putting a question to a minister. (1938) H.C. Pap. 173. The inquiry was based on the possibility of a violation of the Official Secrets Act. The Executive sought to bring Sandys before an allegedly appropriate tribunal. The House of Commons held that Sandys could not be required to respond to any tribunal other than the House itself.

In a more recent case, the House of Commons, contrary to the recommendation of its Committee of Privileges, voted to permit an action to be maintained for a private libel. (1958) 430 H.C. Deb. Col. 208. It is respectfully submitted that the English, without a written Constitution, are more conforming to the concept of separation of powers than we are; that whatever breach of standards committed by a legislator or his aides makes him responsible to the body of which he is a member, in this case, the Senate, is a matter of constitutional provision. Art. I, § 5, that he is not responsible for such actions to the Executive or Judicial branches of the national government is equally a matter of constitutional command. Art. I, § 6. "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney v. Brandhove*, *supra* at 380.

This view was set forth by the Court of Appeals of the District of Columbia in the case of *Cochran v. Couzens*, 42 F.2d 783, (1930):

"Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their

office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues. Article I, § 5."

If this Court is to remain true to the commands of the Constitution, it must hold that neither Senator Gravel nor his aide can be called by the Department of Justice before a grand jury to answer for the Senator's conduct or that of his assistant when they were engaged in their Senatorial duties.

II. FOR THE CONGRESSIONAL PRIVILEGE TO BE EFFECTIVE IT MUST INCLUDE LEGISLATIVE AIDES.

A factual aspect of this litigation can be disposed of by common knowledge. For it hardly requires documentation that the dangers of Executive imposition on legislative independence can as readily—perhaps more readily—flow from attacks on legislative assistants as from attacks directly on the legislators themselves. A Representative or Senator simply cannot function in the Congress without aides who are so intimately involved and identified with him as to be in many instances his alter ego. A great deal of the day-to-day work of the Congress is done in the interchange between Members and their own aides, between Members and the aides of others, and even between aides of one Member and aides of another. Congress is no longer a body which meets for only a few weeks of the year, to conduct most of its business on the floors of the House and Senate. It is in more or less continuous session, with staffs both in Washington and in the home districts, and with most of its business conducted by committee, subcommittee, and staff. A Member cannot conduct all of his business himself; he must and does conduct it largely through his aides. If the Speech or Debate provision is to be meaningful, it must apply to aides acting for their employer-Member in any situation where it would apply to the Member acting for himself. The Solicitor General's suggestion that harassment of an aide would not distract a Member in the performance of his duties simply misstates the facts of life for Congress today.

This was recognized in *United States v. Johnson, supra*, in which it was held that the role of Representative Johnson's aide in the preparation of a speech was within the privilege. *Id.* at 173, 173n. 4.

The only cases in which the privilege has not been extended to Congressional employees are readily distinguishable on two grounds: 1) they involved competing Constitutional rights of individuals; and 2) they involved employees who were engaged in effectuating unconstitutional legislative acts. *Powell v. McCormack, supra* at 501-506; *Dombrowski v. Eastland, supra*; *Kilbourn v. Thompson, supra*.

This is not a case in which the privilege, if sustained, will deny some fundamental constitutional right of a citizen. Nor is there any question here of the constitutionality of the actions taken either by Senator Gravel or by his aide. This is simply a classic, naked conflict between the Executive, concerned by disclosures about its conduct, and a Senator who wished first to know about this conduct and second to make it known to the people at large. The Executive challenges the conduct of Senator Gravel through his aide. Even attributing legitimacy to the Grand Jury effort in this case, the inquiry into the conduct of a Senatorial aide in his activity for and on behalf of his Senator, if permitted, necessarily diminishes the Speech or Debate privilege.

For not only must the privilege protect a Senator from efforts of the Executive to question his speech, it must, if it is to be meaningful, prevent the Executive from acting in such a way as to inhibit a Senator's use of his aides. To isolate a Senator so that he cannot call upon the advice, counsel, and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance. If the aide must fear that a vindictive Executive or

hostile Judiciary will seek to strike at him because it cannot reach his Senator, then the aide will not be able to give his best service to his superior. And the Senator will never be certain whether the advice he gets and the assistance he receives are not the product of the caution and fear engendered by the threats implied. In order that the Senator be protected from Executive interference, the Executive cannot be permitted to delve into what passes between the Senator and his aide.

A recent expression of the argument that the Congressional privilege extends to aides, may be found in the Government's brief in the Court of Appeals for the District of Columbia in the as yet unreported case of *Doe v. McMillan*. In *Doe*, notwithstanding the competing Constitutional claims of the plaintiffs, the Government argued that the aides were privileged because their activity was "within the scope of (their) authority and within the scope of Congress' constitutional power." Government Brief in *Doe v. McMillan*, p. 14. The Government correctly distinguished *Kilbourn v. Thompson*, *supra*, on the ground that in *Kilbourn* "liability arose from the lack of Constitutional authority." *Ibid*.

Because of its recency, and its applicability and importance to the position of the Senate here, the Government's argument is set forth at length:

"The protection of the Speech or Debate clause extends in this case to those seven appellees who are not members of Congress but are their employees or agents—i.e., the staff members (including the investigator and consultant) of the Committee and the officials of the Government Printing Office. In Dombrowski v. Eastland, 387 U.S. 82 (1967), the Supreme Court held that the doctrine of legislative immunity is 'less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves.' Id. at 85. 'Less absolute' in this context, we submit, means simply that before applying the doctrine the courts must

first determine that the legislative employee was *acting within the scope of his authority and within the scope of Congress' constitutional powers*. The *Dombrowski* case itself illustrates this principle. After sustaining the dismissal of the complaint as to Senator Eastland on the ground of legislative immunity, the Supreme Court reversed the judgment of this Court and remanded the case for further proceedings only because it found a disputed question of fact as to whether the defendant Sourwine, counsel to the Subcommittee of which Senator Eastland was chairman, had by his actions transgressed the limits of congressional power under the Constitution so as to expose himself to civil liability.

“That the umbrella of immunity covers legislative officers and employees was first recognized in *Kilbourn v. Thompson*, *supra* note 27. While the Court there found the Sergeant at Arms of the House to be subject to civil liability for the illegal arrest of an uncooperative witness, the decision made clear that such *liability arose only from the lack of constitutional authority . . .*’ Government Brief in *Doe, et al. v. McMillan, et al.*, pages 13-14. (Emphasis added.)

This argument was accepted by the Court of Appeals which held that the Speech or Debate privilege applied to aides. *Doe v. McMillan, supra*.

The Congressional privilege based upon an express Constitutional provision to encourage the free exchange of ideas and information can hardly be less extensive than the Executive privilege which has no express statutory or Constitutional basis and whose sole purpose is secrecy. Yet the Executive privilege has been extended to the activities of persons whose relationship to the President is far more remote than the relationship of an aide to a Senator.

The need for protecting the confidential relationships between the President and his aides, as the Government has asserted in defending the Executive privilege, is *pari passu* applicable to the need for protecting the relationship between Senators and their aides. The parallel was well drawn

by the Honorable William H. Rehnquist in the recent hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary:

“The notion that the advisers whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the Government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite system of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks.” *Hearings on Executive Privilege: The Withholding of Information by the Executive before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess. (1971), p. 424.*

This Court has recognized the need to apply the protection of another Executive privilege—also a privilege without constitutional warrant—beyond the highest government officials to those who, in fact, are performing the acts and duties with which the higher officials are charged. In *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959), this Court said:

“We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.”

III. DISSEMINATION OF INFORMATION IS A LEGISLATIVE FUNCTION.

The United States Senate contends that Senator Gravel's reading into the Subcommittee record parts of the "Pentagon Papers" protects the Senator and his aide from judicial inquiry into the Senator's effort to inform his colleagues and the public about his views on the war in Vietnam. The Senate further contends that whether such actions were authorized or not is a decision for the Senate and not for the Judiciary.

The Constitution itself makes it clear that it was intended for Congress to inform the public of the matters with which it was concerned. Article I, § 5, provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may *in their judgment* require Secrecy." (Emphasis added.)

Tested by any of the criteria established by this Court, the informing function is clearly within the scope of privileged activity. The Court has used various words to describe the limits of the privilege:

"... related to the due functioning of the legislative process." *United States v. Johnson, supra* at 172.

"... acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove, supra* at 376.

"... acting in a field where legislators traditionally have power to act" *Tenney v. Brandhove, supra* at 377.

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson, supra* at 204.

An early and often repeated statement of this proposition was made in *Coffin v. Coffin*, *supra*, quoted with approval in *Tenney v. Brandhove*, *supra* at 374.

“... the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.”

To this must be added what this Court said in *Tenney v. Brandhove*, *supra* at 377:

“The claim of an unworthy purpose does not destroy the privilege.”

The actions of Senator Gravel and his assistant that would be the subject of scrutiny by the Grand Jury, if not for the “Speech or Debate” Clause,—were the dissemination of data about the conduct of the Vietnam War. Woodrow Wilson in his classic work on the role of Congress, states the case for the informing function:

“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most

important that it should understand and direct. *The informing function of Congress should be preferred even to its legislative function.*" Wilson, Congressional Government 303 (1885), quoted with approval in *Tenney v. Brandhove*, *supra* at 377m. 6. (Emphasis added.)

Whether the informing function is more important than the legislative function is not an issue here. It is clear that it is *a* function of Congress.

Again, support for this view is found in the Government's brief in the Court of Appeals in *Doe v. McMillan*. The *Doe* plaintiffs sought to enjoin publication of the report of a Congressional committee and damages because the report contained plaintiffs' names and poor school records. In arguing, successfully, to sustain the right of Congress to make reports and for Congressional immunity under the Speech or Debate clause, the Government quoted the following statement from *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731-732 (D.D.C. 1956):

"Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing We think it equally clear that *nothing authorizes anyone to prevent Congress from publishing any statement.*

* * * * *

"... We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the *Congressional Record*. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds

nothing to our authority. Only Congress can deal with such a problem.” (Emphasis added in the Government Brief in *Doe v. McMillan*, page 12.)

Continuing the argument in *Doe*, the Government’s brief states:

“It is obvious that the Committee was ‘acting in the sphere of legitimate legislative activity.’ *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Indeed, appellants have never alleged otherwise. *This being the case, judicial inquiry is at an end.* ‘The courts should not go beyond the narrow confines of determining that a committee’s inquiry may fairly be deemed within its province.’ *Tenney v. Brandhove, supra*, 341 U.S. at 378.” Government Brief in *Doe v. McMillan*, page 13. (Emphasis added.)

This portion of the Government’s brief in *Doe* then concludes with a short statement of the Senate’s position here:

“Nor is the protection of the constitutional privilege limited to the mere publication of the report. The members of the Committee are protected from judicial interference in any use to which they may put information obtained by them in the exercise of their legislative function. *Hearst v. Black*, 66 App. D.C. 313, 87 F.2d 68 (1936). If appellants suffer embarrassment or disgrace from the disclosure of certain information by the Committee in its report, their only recourse is to Congress itself, as cases such as *Methodist Federation* and *Hearst* make clear. They cannot ask the judiciary to intrude upon the constitutional independence of the legislature.” Government Brief in *Doe v. McMillan*, page 12. (Emphasis added.)

That the dissemination of information is an important part of the legislative function is also attested by the filing of this brief by that body most qualified to express an opinion on the subject: The Senate of the United States.

CONCLUSION

There is no basis in history nor in this Court's decisions nor in the prior positions of the Government for the arguments made in this case for the denial of the Congressional privilege to an aide to a Senator, acting on behalf of the Senator, in disseminating information. There is no suggestion of unconstitutionality in the conduct of the Senator or his aide. The cases are clear and unequivocal that the privilege is denied only where there is unconstitutional conduct.

No citizen is here claiming that his Constitutional rights have been infringed by unconstitutional conduct. Instead, the privilege is attacked from the very source from which attack has come historically, the Executive. It was to protect against just such attacks that the privilege evolved.

It is the position of the Senate that, absent unconstitutional activity, neither the Executive, nor the Judiciary has any authority or jurisdiction over Senators or their aides. This control is vested solely in the Senate both expressly in Article I, Section 6, and by the doctrine of separation of powers. The Senate calls upon this Court to use this opportunity to restate the fundamental Constitutional principles challenged by the Government in this case:

1. The Congressional privilege under the Speech or Debate clause extends to aides acting for Members; except where their acts constitute unconstitutional conduct, aides, like Members, "shall not be questioned in any other place."

2. Dissemination of information is an essential function of Congress protected by the Congressional privilege.

Neither Senator Gravel nor his aide should be required to testify before the Grand Jury, and no other witness should be permitted to testify as to the activities of the Senator or his aide.

Respectfully submitted,

Senator Sam J. Ervin, Jr.
Senator James O. Eastland
Senator John O. Pastore
Senator Herman E. Talmadge
Senator Norris Cotton
Senator Peter H. Dominick
Senator Charles McC. Mathias, Jr.
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APPENDIX A

92nd CONGRESS

2D SESSION

S. RES. 280

IN THE SENATE OF THE UNITED STATES

March 17, 1972

Mr. MANSFIELD submitted the following resolution; which
was ordered to lie over under the rule

March 20, 1972

Ordered to be placed on the calendar

March 23, 1972

Considered, amended, and agreed to

RESOLUTION

Authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution.

Whereas the Supreme Court of the United States on Tuesday, February 22, 1972, issued writs of certiorari in the case of Gravel against United States; and

Whereas this case involves the activities of the junior Senator from Alaska, Mr. Gravel; and

Whereas in deciding this case the Supreme Court will consider the scope and meaning of the protection provided to members of Congress by article I, section 6, of the United States Constitution, commonly referred to as the "Speech or Debate" clause, including the application of this provision to Senators, their aides, assistants, and associates, and the types of activity protected; and

2a

Whereas this case necessarily involves the right of the Senate to govern its own internal affairs and to determine the relevancy and propriety of activity and the scope of a Senator's duties under the rules of the Senate and the Constitution; and

Whereas this case therefore concerns the constitutional separation of powers between legislative branch and executive and judicial branches of Government; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the United States Senate has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

Resolved, That the President pro tempore of the Senate is hereby authorized to appoint a bipartisan committee of Senators to seek permission to appear as amicus curiae before the Supreme Court and to file a brief on behalf of the United States Senate; and be it further

Resolved, That the members of this bipartisan committee shall be charged with the responsibility to establish limited legal fees for services rendered by outside counsel to the committee, to be paid by the Senate pursuant to these resolutions; and be it further

Resolved, That any expenses incurred by the committee pursuant to these resolutions including the expense incurred by the junior Senator from Alaska as a party in the above mentioned litigation in printing records and briefs for the Supreme Court shall be paid from the contingent fund of the Senate on vouchers authorized and signed by the President pro tempore of the Senate and approved by the Committee on Rules and Administration; and be it further

Resolved, That these resolutions do not express any judgment of the action that precipitated these proceedings; and be it further

Resolved, That the Secretary of the Senate transmit a copy of these resolutions to the Supreme Court.

THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND DISCLOSING INFORMATION

WEDNESDAY, MARCH 28, 1973

U.S. CONGRESS,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C.

The Joint Committee met, pursuant to notice, at 10:15 a.m., in room S-407, the Capitol, Hon. Lee Metcalf [chairman] presiding.

Present for the Senate: Senator Mike Gravel, Alaska, and Senator Jesse A. Helms, North Carolina.

Present for the House: Representative Jack B. Brooks, Texas, vice chairman, and Representative John Dellenback, Oregon.

Chairman METCALF. The committee will be in order.

Our first witness this morning is our colleague, Senator Gravel. He has waited very patiently and has been put off twice in deference to some of our other witnesses.

Senator Gravel, I don't know whether you will go down in history as Mr. Shelley has in the law of Shelley's case, but at least, law students for years and years will remember the case in which you participated and which is going to be one of the leading cases on this question of congressional immunity. I congratulate you on your activities in making sure that certain materials were published and your constituents and mine were informed, and I am looking forward to your statement today. We are happy to hear now from our colleague on the committee, the junior Senator from Alaska, Senator Gravel.

STATEMENT OF HON. MIKE GRAVEL, A U.S. SENATOR FROM ALASKA

Senator GRAVEL. Thank you very much, Mr. Chairman. I do appreciate your patience.

This morning, the approach that I will take encompasses a good deal of the experience of other legislators—Senator Fulbright, Senator Ervin, and others. My proposal is embodied in a bill that the committee has circularized. Also there is a statement accompanying that bill, and an analysis, all of which I will put in the record. I have before me an outline and I will try to treat the salient points.

[The material referred to above follows:]

PREPARED STATEMENT, PROPOSED LEGISLATION, AND SECTION ANALYSIS BY SENATOR
MIKE GRAVEL, A MEMBER OF CONGRESS

The prerequisite of a free, self-governing people is an enlightened citizenry. If the American people are to be meaningful participants in the operation of their government, they must have easy access to virtually all information. The government's shrill claims of a "need" for secrecy must give way to the higher priority of the citizen's need to know, his right to know.

At present the scales are tipped heavily in favor of the government. Information is systematically classified and withheld from the public for vaguely determined reasons of "national security." At the same time, it is denied to Congress by the imperious assertion of "executive privilege." These two ridiculously flexible tools of secrecy demonstrate a rubbery quality that can be stretched and shaped far beyond the mere encompassment of what might be construed as legitimately sensitive defense and diplomatic data. They provide self-appointed decision-makers with a protective shield against public accountability.

Recent decisions of the Supreme Court—vigorously sought by the Executive—will materially aid the government in keeping its secrets secret. The rulings requiring newsmen to reveal their confidential sources and information will cause press informants critical of government policies to "dry up." Similarly, the decisions severely limiting the immunity of a Member of Congress from being questioned in any other place concerning his legislative activities will both impair his ability to acquire information and deter him from disclosing it to the public even if it should happen to come into his possession.

The decisions handed down by the Court in this second area of legislative immunity provide the focus for these hearings by the Joint Committee on Congressional Operations: What is the role of the Congress in gathering and disclosing information?

The central issue of these hearings is the public's right to be informed about the workings of its government. A dialogue between Congress and the people is a necessary element of a representative system. The Constitution presupposes an obligation on the part of a legislator to inform his constituents about vital matters concerning the administration of government.

The informing function plays a key role in our system of separation of powers, for it insures that the administration of public policy by the many non-elected officials of the executive branch is fully understood by the people. As Woodrow Wilson wrote in his classic study of Congress:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." (*Congressional Government*, p. 303)

Departing drastically from the theories of government in Europe, the framers of the Constitution believed that ultimate power must always rest with the people. For this system to be viable, the people must be informed fully of the workings of government. This imposes a *duty* on Members of Congress to inform the electorate.

The constitutional role of the Congress is that of an adversary for the people vis-a-vis the government. In order to perform this adversary function assigned by our forefathers, the Congress must be informed, but it must also be free of fear of retribution when it informs the public. This is the central importance of the doctrine of legislative immunity, derived from the "Speech or Debate" clause of Article I, section 6 of the Constitution.

In gathering and disclosing information the Congress must be protected from harassment and intimidation. A Member of Congress should be immune from criminal prosecution for his legislative acts.

The issue at stake is the fundamental one of separation of powers. The purpose of the Speech or Debate clause is to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary. If the executive branch may institute grand jury proceedings and interrogate witnesses about legislative activities, it will possess the power to isolate all but the most courageous legislators from their constituents. Members of Congress will have to watch what they say to the public, and they will inevitably be inhibited by the fear of prosecution. Yet if the Speech or Debate clause means anything, it means that courts and prosecutors are not referees over what Members of Congress may say to the people or how they may say it.

Immunity from executive prosecution does not mean Members of Congress are answerable to no one—they can and will be disciplined by their own House and by the people who elect them. Immunity also does not mean that a Member of Congress may use the authority of his office to violate willfully an individual's

constitutional rights. Any legislative action the Congress takes to protect its own immunity should not extend to suits against its Members.

But the Congress must act to restore its constitutionally granted legislative immunity. It cannot allow the Executive and the Judiciary to determine its prerogatives.

It deserves repeating, however, that the importance of legislative immunity lies in the informing and adversary roles of Congress. The immunity itself is hollow and worthless if the Congress fails to live up to its constitutional responsibility to communicate with the people. I therefore urge the Committee—when it frames its recommendations for legislative action—to consider not only what must be done to buttress the Speech or Debate clause, but also what tools the Congress must provide itself if it intends to live up to its public responsibility. I have identified four areas which seem to me to be crucial:

(1) Congress must control excessive secrecy by establishing guidelines and limitations for classification and declassification. This does not mean mandating secrecy itself.

(2) Congress must put a stop to the abuse of executive privilege. While the advisor relationship should be kept sacrosanct, it should never be used to keep information from the Congress.

(3) Congress should establish its own General Counsel to preserve its own immunity, defend its Members, and act aggressively to halt executive usurpation of power.

(4) Congress must grant newsmen immunity from disclosure of information and sources. A free press will assist Congress in informing the people, and it will keep the Congress itself honest.

I have attempted to deal with the problems in each of these areas, as well as with legislative immunity, in separate titles of a comprehensive bill, the "Public Information Act of 1973." I ask that this bill, together with an accompanying section-by-section analysis, be printed at this point in the hearing record.

A BILL To provide guidelines and limitations for the classification of information and material, to ensure the integrity of the Congress as a separate branch of the Government by preventing the unwarranted interference in Congressional functions by the Executive and Judicial branches, to establish an Office of the General Counsel to the Congress, to require the disclosure of information to Congress by the Executive branch, to protect the confidentiality of information and sources of information of the news media, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Information Act of 1973."

TITLE I—AMENDMENTS TO FREEDOM OF INFORMATION ACT

SHORT TITLE

SECTION 101. This title may be cited as the "Freedom of Information Act Amendments of 1973".

ATTORNEYS' FEES

SEC. 102. Section 552(a)(3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "The court shall award reasonable attorneys' fees and court costs to the complainant if it issues any such injunction or order against the agency."

CONFORMING AMENDMENTS

SEC. 103. Section 552(b) of title 5, United States Code, is amended—

(1) by striking out "(b) This section" and inserting in lieu thereof "(b) (1) Subsection (a)";

(2) by redesignating paragraphs (1) through (9) as subparagraphs (A) through (I), respectively;

(3) by striking out subparagraph (A), as redesignated by clause (2), and inserting in lieu thereof the following: "(A) designated Secret Defense Data in accordance with subsection (d)"; and

(4) by inserting at the end thereof the following new paragraph:

"(2) Subsection (a) applies to any matter which is declassified under subsection (e)."

CLASSIFICATION OF INFORMATION

SEC. 104. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d)(1) The Congress finds and declares that the free flow of information among individuals, between the Government and the citizens of the United States, and among the separate branches of the Government is essential to the proper functioning of the Constitutional processes of the United States. The Congress further finds that certain unwarranted policies and procedures for the classification of information and to material have in the past unduly inhibited this free flow of information, and that in order to correct this situation it is necessary to prescribe certain guidelines and limitations for the classification of information and material which the President or the head of an agency determines to require limited dissemination in the interest of national defense. By prescribing such guidelines and limitations, it is not the intention of the Congress either to encourage the classification of information and material or to establish as a criminal offense, in itself, the unauthorized disclosure of any such classified information or material.

"(2) The President and the heads of those agencies listed under subparagraph (A) of paragraph (4) are authorized to classify as 'Secret Defense Data' any official information or material originated or acquired by them, the unauthorized disclosure of which may reasonably be expected to cause damage to the national defense. Official information or material may be classified as Secret Defense Data only if its unauthorized disclosure would adversely affect the ability of the United States to protect and defend itself against overt or covert hostile action. In no case shall information or material be classified in order to conceal incompetence, inefficiency, wrongdoing, or administrative error, to avoid embarrassment to any individual or agency, to restrain competition or independent initiative, or to prevent or delay for any reason the release of information or material the dissemination of which will not damage the national defense.

"(3) Except as otherwise provided by law, no designation other than 'Secret Defense Data' shall be used to classify information or material in the interest of national defense. The President or the head of the agency originating or receiving Secret Defense Data may use such routing indicators as may be appropriate to assist in limiting the dissemination of individual items of such Secret Defense Data to designated recipients.

"(4)(A) Official information or material may be originally classified as Secret Defense Data by the heads of—

"(i) such offices within the Executive Office of the President as the President may designate by Executive Order;

"(ii) the Department of State;

"(iii) the Department of Defense and the military departments, as defined in section 102 of this title;

"(iv) the Department of the Treasury;

"(v) the Department of Justice;

"(vi) the Department of Commerce;

"(vii) the Department of Transportation;

"(viii) the Atomic Energy Commission;

"(ix) the Central Intelligence Agency; and

"(x) the National Aeronautics and Space Administration.

"(B)(i) The President and the head of each agency listed under subparagraph (A) may authorize in writing senior principal deputies, assistants, and subordinate officials within each such agency to classify official information or material as Secret Defense Data. In no case may any individual occupying a position lower than the level of section chief or its equivalent be authorized to classify official information or material as Secret Defense Data, and no individual may be granted such authority unless his daily operational responsibilities require that he have such authority.

"(ii) Officers and employees of agencies other than agencies listed under subparagraph (A) may not classify official information or material, and the authority to classify may not be delegated or transferred to any other agency except by act of Congress. An officer or employee of an agency who is not authorized to classify official information or material under this subsection, but who originates or supervises the origination of official information or material which he believes to qualify for classification as Secret Defense Data, may recommend classification of any such information or material by the head of the

agency having both a direct official interest in the information or material and the authority to classify it.

"(iii) Each individual authorized by the head of an agency listed under subparagraph (A) to classify official information or material shall be furnished with written instructions advising him of the subject matter which he may classify and of any other requirements applicable to him in the exercise of his classification authority. The head of each such agency shall semiannually review his designation of authority to classify official information or material and shall revoke such designation in the case of any individual whose operational responsibilities no longer require that he have such authority.

"(iv) No individual authorized to classify official information or material may redelegate such authority to any other individual.

"(v) Any individual who, acting in a clerical capacity, handles any classified information or material need not have authority to classify such information or material in order to copy or otherwise reproduce or to put classification markings on such information or material.

"(5) The head of each agency listed under paragraph (4)(A) shall compile and maintain a complete list of the names and official addresses of all individuals within such agency who are authorized to classify official information and material. A copy of such list shall be submitted quarterly by each such agency head to the Comptroller General of the United States. A copy of each such list shall be made available, upon written request to the appropriate agency head by any Member or committee of Congress, to such Member or committee.

"(6) Official information and material shall be classified according to what it contains or reveals and not according to its relationship with or reference to other information or material. No document or other material may be classified unless it contains or reveals an element of official information specifically designated as Secret Defense Data pursuant to this subsection.

"(7) Any document or other material object, including communications transmitted by electrical means, containing or revealing information designated as Secret Defense Data shall be appropriately and conspicuously marked or otherwise identified to show—

"(A) the designation 'Secret Defense Data';

"(B) any routing designator which may have been assigned;

"(C) the office or origin;

"(D) the date of origin;

"(E) the name and title of the individual who classified the document or object; and

"(F) the date of original classification.

The marking or other identification shall be limited to those paragraphs or other separate segments of the document or other object which require protection, and the classification authority shall (i) mark or identify only those paragraphs or segments which require protection, or (ii) include with the document or other object a statement specifically describing those paragraphs or segments which require protection.

"(8) Information or material furnished to the United States by a foreign government or international organization, the unauthorized disclosure of which could reasonably be expected to cause damage to the national defense or to the defense of a foreign government with which the United States is allied, may be designated as Secret Defense Data, except that any such information or material shall be provided to any Member or committee of Congress upon written request to the appropriate agency, notwithstanding any contrary agreement or stipulation.

"(9) Official information or material originated or acquired by an agency and classified as 'Confidential', 'Secret', or 'Top Secret' pursuant to any Executive order shall be subject to the provisions of this subsection. Subject to review procedures established by the President or head of an agency, any officer or employee having custody of a document or other material classified as Confidential, Secret, or Top Secret, which is in use or withdrawn from file or storage for use, shall mark it in accordance with the provisions of this subsection to show that it has been designated as Secret Defense Data, or to show that it has been declassified and cite this subsection or subsection (e) as the authority for such marking, unless declassification was accomplished before the effective date of this subsection.

"(c) (1) (A) Any official information or other material which—

"(i) is classified pursuant to the provisions of subsection (d) after the effective date of such subsection; and

"(ii) at any time thereafter ceases to meet the requirements of subsection (d) (2), or can no longer be protected against unauthorized disclosure, shall be declassified promptly by the President or an individual within the appropriate agency who has the authority to classify such information or material.

"(B) Except as provided in paragraph (2), any official information or material which is classified pursuant to subsection (d) on or after the effective date of such subsection and which is not declassified as provided in subparagraph (A), shall be declassified automatically upon the expiration of two years after the end of the month of its classification, by the President or an individual within the appropriate agency who has authority to classify such information or material, regardless of whether or not the document or material has been marked to show the declassification.

"(C) Except as provided by paragraph (2), any official information or material which was originally classified as Confidential, Secret, or Top Secret pursuant to any Executive order during the two-year period immediately preceding the effective date of subsection (d), and which is classified as Confidential, Secret, or Top Secret on such effective date, shall be declassified automatically upon the expiration of two years after the end of the month of the original classification of such information or material, by the President or an individual within the appropriate agency who has the authority to classify such information or material, regardless of whether or not the document or other material has been marked to show the declassification. If the original date of declassification of such information or material is not known, it shall be declassified automatically not later than the expiration of two years after the effective date of subsection (d).

"(D) Except as provided by paragraph (2), any official information or material which was originally classified pursuant to any Executive order, directive, memorandum, or other authority prior to the two-year period immediately preceding the effective date of subsection (d), and which continues to be classified on such effective date, shall be declassified automatically upon the expiration of six months after such effective date, by the President or an individual within the appropriate agency who has authority to classify such information or material, regardless of whether the document or other material has been marked to show the declassification.

"(2) (A) Any official information or material which is classified and which is subject to automatic declassification as provided in subparagraph (B), (C), or (D) of paragraph (1) may be assigned a deferred automatic declassification date by the President or the head of the agency which originally classified such information or material or by the head of the agency which has responsibility for such information or material in the case of a transfer of functions from one agency to another, upon a determination by the President or the agency head that the information or material is of such sensitivity and importance to continue to satisfy the requirements for classification as Secret Defense Data. For each item of information or material for which the President or the head of an agency makes such a determination, he shall submit, in writing, to the Committee on Government Operations of the Senate, the Committee on Government Operations of the House of Representatives, and the Comptroller General of the United States a detailed justification for the continued classification of such information or material. Both such committees shall compile and print at least annually as a public document all such reports received by them, except that upon recommendation of the President or the head of the agency concerned, such committee may delete from printing any material which itself satisfies the requirements for classification as Secret Defense Data. Each such deletion shall be indicated in the printed document, and the complete document without deletions shall be kept in committee files and made available, upon request, to any Member or committee of Congress. In no case may the President or the head of an agency assign a deferred automatic declassification date of more than two years after the date of declassification provided for under subparagraph (B), (C), or (D) of paragraph (1), except that such official may assign an additional deferred automatic declassification date upon determination that the classified information or material continues to satisfy the criterion for classification as Secret Defense Data. For each such deferral such official shall submit a written justification as provided herein. The authority to defer declassification shall not be redelegated by the head of any agency. Any in-

formation or material assigned a deferred automatic declassification date may at any time be declassified in accordance with paragraph (1) (A).

"(B) (i) Any person may bring a civil action on his own behalf against the President or the agency head who is alleged to have deferred the automatic declassification date of official information or material which does not satisfy the requirements (as described in subsection (d) (2)) for classification as Secret Defense Data. The district court of the United States in the district in which the complainant resides, or has his principal place of business, or the district court for the District of Columbia, has jurisdiction to enjoin the President or the agency head from deferring the automatic declassification date of information or material and to order such declassification upon finding that such information or material does not satisfy the criterion for classification as Secret Defense Data. In such a case the court shall determine the matter de novo and the burden is on the President or the agency head to sustain his action. In the event of non-compliance with the order of the court, the district court may punish for contempt the responsible official. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

"(ii) The court, if it issues any injunction or order against the President or the agency head in any action brought pursuant to subparagraph (B) (i), shall award reasonable attorneys' fees and court costs to the complainant.

"(3) The declassification of Secret Defense Data shall be accomplished by issuance of an official announcement describing or otherwise identifying the information or material to be declassified, or by the classification authority authenticating the declassification according to the procedures described in paragraph (4) on the record copy of a document or other material and notifying all holders of copies of such document or material that the information or material has been declassified.

"(4) Any information or material which is declassified, including information or material automatically declassified, shall be marked as soon as practicable in order clearly to show that it has been declassified. Such information or material also shall be annotated to show the date of the declassification and the name and title of the person who authorized the declassification. Information or material which is in storage when declassified need not be marked or annotated until it is withdrawn for use, and information or material which is declassified and which is designated for destruction need not be marked or annotated but may be destroyed according to procedures applicable to other non-classified material.

"(5) The head of an agency which has responsibility for functions transferred from another agency shall exercise declassification authority for such Secret Defense Data as falls within the purview of the transferred functions, even if such agency does not have original classification authority. The Administrator of Services shall exercise declassification authority for such Secret Defense Data as has been transferred to the General Services Administration in order to be placed in the Archives of the United States. In order to carry out the provisions of this paragraph, heads of agencies may designate such senior principal deputies, assistants, and subordinate officials as they may require to accomplish declassification.

"(6) An officer or employee who has custody of Secret Defense Data which he believes no longer requires classification, and concerning which he does not have declassification authority, may recommend immediate declassification by the person or office having both a direct official interest in such Secret Defense Data and the authority to declassify it.

"(f) (1) The head of each agency which exercises authority to classify or declassify official information or material shall, in conjunction with the Comptroller General of the United States, prescribe such regulations as he considers necessary or appropriate to carry out the provisions of subsections (d) and (e) of this section, including regulations which prescribe administrative reprimand, suspension, or other disciplinary action for the improper classification of official information or material.

"(2) The Comptroller General of the United States shall monitor the actions taken by agencies to implement and adhere to the policies and provisions of subsections (d) and (e) of this section. To this end the Comptroller General shall perform, among others, the following functions:

"(A) Prescribe, in conjunction with heads of agencies, such regulations as may be necessary to achieve uniformity among agencies in the implementation of subsections (d) and (e) of this section.

"(B) Obtain and review agency implementing regulations and those of such subordinate components as may be necessary to determine the effectiveness of agency actions.

"(C) Inquire on a periodic basis regarding the need for assignment or retention of the Secret Defense Data designation on selected documents and other material.

"(D) Conduct visits on a periodic basis to observe the practical application of classification and declassification policy and the safeguarding of Secret Defense Data by officers and employees of agencies.

"(E) Investigate, when deemed appropriate, inquiries initiated by private citizens, officers or employees of the United States, or any other person concerning any allegation of improper classification of information or material, or concerning any allegation of the failure of any agency, or any officer or employee thereof, to comply with the policies and provisions of subsection (d) or (e) of this section, or any regulation prescribed under this subsection.

"(F) Transmit semi-annual reports not later than March 1 and September 1 of each year to both the Senate Committee on Government Operations and the House Committee on Government Operations, setting forth the findings of such reviews, inquiries, visits, and investigations as may have been conducted pursuant to subparagraphs (B) through (E) during the reporting period, as well as any other matters pertaining to the implementation of subsections (d) and (e) which may be of interest to the committees. Such reports also shall contain any recommendations for action by the committees relating to this Act which the Comptroller General may deem appropriate.

"(g) No person may withhold or authorize withholding information or material from the Congress, or any committee or Member thereof, or from any court of the United States on the basis that such information or material is classified or qualified for classification as Secret Defense Data or is otherwise classified pursuant to any law, Executive order, directive, memorandum, or other authority."

ATOMIC ENERGY RESTRICTED DATA

SEC. 105. The provisions of this title shall not affect any requirement made by or under the Atomic Energy Act of 1954, as amended, regarding the designation and protection of Restricted Data, as defined in that Act.

EFFECTIVE DATE

SEC. 106. (a) Except as provided in subsection (b), the provisions of this title shall take effect on the first day of the fourth month that commences after the date of its enactment.

(b) Section 552(f), as added by section 104 of this title, shall take effect upon the date of enactment of this Act.

TITLE II—CONGRESSIONAL PROTECTION

SEC. 201. Part II of title 48, United States Code, is amended by adding at the end thereof the following new chapter:

"CHAPTER 239—CONGRESSIONAL PROTECTION

"Sec.

"§791. Congressional protection.

"§ 3791. Congressional protection

"(a) Notwithstanding any other provision of law, the courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Commissioners, and the United States magistrates shall have no jurisdiction to conduct any criminal proceeding with respect to offenses against the laws of the United States if such proceeding relates to a legislative activity of a Member of Congress.

"(b) (1) If an attorney for the United States intends to issue a subpoena to any person, and such attorney has reason to believe that the subpoena, or any part thereof, relates to a legislative activity of a Member of Congress, then such attorney shall immediately notify the Attorney General of the United States. The Attorney General shall approve personally the issuance of the subpoena, and

shall notify in writing such Member and the President pro tempore of the Senate, in the case of a Senator, or the Speaker of the House of Representatives, in the case of a Representative, a Resident Commissioner, or a Delegate of the House of Representatives, not less than 48 hours in advance of the issuance of the subpoena.

"(2) If at any time in the course of any criminal proceeding it appears that testimony which relates to the legislative activity of a Member of Congress is being heard or may be heard, and the provisions of paragraph (1) have not been complied with, then the court shall stay the proceedings and give such Member an opportunity to move, as provided in subsection (c), to quash the subpoena or subpoenas, pursuant to which testimony is being taken.

"(c) If any subpoena is issued to any person with respect to any activity of a Member of Congress, that Member may file a motion, before the court under whose seal the subpoena was issued, asking that the subpoena, or any part thereof, be quashed on the grounds that such subpoena or part thereof relates to a legislative activity of such Member and is therefore beyond the jurisdiction of such court, commissioner, or magistrate, as the case may be. Upon the filing of such motion, the subpoena, or part thereof, sought to be quashed shall be stayed. In any hearing on a motion to quash the subpoena, the United States (1) is required to state with particularity the information it intends to receive as the result of the issuance of the subpoena, and (2) shall have the burden of proving, beyond a reasonable doubt, that such subpoena, or part thereof, does not relate to any legislative activity of such Member. If the United States fails to satisfy the provisions of both clauses (1) and (2) of this subsection, the subpoena or part thereof shall be quashed. If the court finds that both such clauses have been satisfied, the court may order the enforcement of the subpoena or part thereof. However, the order shall specify with particularity, and as narrowly as practicable, the information about which the United States may inquire or obtain under such subpoena in order to assure that such information will not relate to any legislative activity of such Member.

"(d) For purposes of this section—

"(1) 'court of the United States' has the same meaning given that term under section 451 of title 28;

"(2) 'legislative activity' means any activity of a Member of Congress, while a Member of the Congress, relating to the due functioning of the legislative process and carrying out the obligations a Member of Congress owes to the Congress and to his constituents, and includes, but is not limited to speeches, debates, and votes, in either House of Congress, committee or subcommittee conduct, gathering or receipt of information for use in legislative proceedings, speeches or publications outside of Congress informing the public on matters of national or local importance, and the motives and processes by which a decision was made with respect thereto; and

"(3) 'Member of Congress' means either a present or former Senator, or a present or former Representative, Resident Commissioner, or Delegate of the House of Representatives."

SEC. 202. The table of chapters of part II of such title 18, preceding section 3001, is amended by adding at the end thereof the following:

"239. Congressional protection."

TITLE III—OFFICE OF THE GENERAL COUNSEL TO THE CONGRESS

ESTABLISHMENT

SEC. 301. There is established in the Congress an office to be known as the Office of the General Counsel to the Congress, referred to hereinafter as the "Office."

PURPOSE AND POLICY

SEC. 302. The purpose of the Office shall be to provide legal advice, legal representation, legal counseling, and other appropriate legal services to the Congress, its two Houses, and their respective committees, Members, officials and employees in those matters relating to their institutional or official capacities and duties. The Office shall maintain impartiality as to matters brought before it, and it shall provide services indiscriminantly to any committee or Member of Congress unless directed otherwise by either House or Congress as a whole.

The Office shall maintain the attorney-client relationship with respect to all communications between it and any committee or Member of Congress.

FUNCTIONS

SEC. 303. The functions of the Office shall be as follows :

(a) Upon the request of the Congress, either of its two Houses, any joint committee of the Congress, or any committee of either House of the Congress, to commence civil action against the President or any other officer of the government to compel compliance with any law.

(b) Upon the request of the Congress, either of its two Houses, any Member of the Congress, any joint committee of the Congress any committee of either House of the Congress, or any subcommittee of any such committee, to commence civil action against the President or any other officer of the government to compel compliance with any request for information.

(c) Upon the request of the Congress, either of its two Houses, any Member of the Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee, to represent the Congress, either of its two Houses, or any of their respective committees, Members, former Members, officers or employees before any grand jury proceeding or in any civil or criminal action arising from their performing or not performing any action relating to their institutional or official capacities and duties.

(d) Upon the request of the Congress, either of its two Houses, any Member of the Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee, to intervene as a party before any grand jury proceeding or in any civil or criminal proceeding.

(e) Upon the request of the Congress, either of its two Houses, any joint committee of the Congress, or any committee of either House of the Congress, to appear before the Supreme Court or any other court of the United States as *amici curiae* in cases involving the intent and meaning or constitutionality of legislation or of any action of either House of Congress.

(f) To review rules and regulations from time to time issued by the various agencies of the Government and to report to the Congress as to whether such rules and regulations are authorized by the legislation under which they purport to be issued.

(g) To bring to the attention of the Congress such legal proceedings, actions of the Government, and other matters which relate to the institutional or official capacities or duties of the Congress or its Members.

(h) To furnish advice and other appropriate services to any Member of the Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee in connection with the foregoing.

CONGRESSIONAL COUNSEL

SEC. 304. The management, supervision, and administration of the Office are invested in the General Counsel to the Congress who shall be appointed by the President pro tempore of the Senate, the Speaker of the House of Representatives and the majority leaders and minority leaders of the Senate and House of Representatives (referred to hereinafter as the "Leaders") acting unanimously, without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. In the event of the failure of the Leaders to act, the appointment shall be made by majority vote of both the Senate and the House of Representatives. Any person so appointed shall serve for only one term of ten years but may be removed from office by the Leaders, acting unanimously.

STAFF

SEC. 305. With the approval of the Leaders, or in accordance with policies and procedures approved by them, the General Counsel shall appoint such attorneys and other employees as may be necessary for the prompt and efficient performance of the functions of the Office. Any such appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person so appointed may be removed by the General Counsel to the Congress with the approval of the Leaders, or in accordance with policies and procedures approved by the Leaders.

COMPENSATION

SEC. 306. (a) The General Counsel to the Congress shall be paid at a per annum gross rate equal to the rate of basic pay, as in effect from time to time, for level III of the Executive Schedule of section 5314 of title 5, United States Code.

(b) Members of the staff of the Office other than the General Counsel to the Congress shall be paid at per annum gross rates fixed by the General Counsel with the approval of the Leaders, or in accordance with policies approved by the Leaders, but not in excess of a per annum gross rate equal to the rate of basic pay, as in effect from time to time, for level V of the Executive Schedule of section 5316 of title 5, United States Code.

EXPENDITURES

SEC. 307. In accordance with policies and procedures approved by the Leaders, the General Counsel to the Congress may make such expenditures as may be necessary or appropriate for the functioning of the Office.

OFFICIAL MAIL

SEC. 308. The Office shall have the same privilege of free transmission of official mail matter as other offices of the United States Government.

AUTHORIZATION OF APPROPRIATIONS

SEC. 309. There are authorized to be appropriated, for the fiscal year ending June 30, 1973, and for each fiscal year thereafter, such sums as may be necessary to carry out this Title and to increase the efficiency of the Office and the quality of the services which it provides.

TITLE IV—PRIVILEGED INFORMATION

SEC. 401. Chapter 6 of title 2, United States Code, is amended by adding the following new section:

“§ 192a. Privileged Information

“(a) The Congress declares that information or material of, or under the custody or control of, any agency, officer, or employee of the Government is to be made available to the Congress so that the Congress may exercise, in an informed manner, the authority conferred upon it by article I of the Constitution to make laws necessary and proper to carry into execution the powers vested in the Congress and all other powers vested in that Government or any department or officer thereof.

“(b) For the purpose of this section—

“(1) ‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

“(A) the Congress;

“(B) the courts of the United States; or

“(C) the governments of the territories or possessions of the United States;

“(2) ‘employee’ means—

“(A) an employee in or under an agency;

“(B) a member of the uniformed services; and

“(C) an employee engaged in the performance of a Federal function under authority of an Executive act; and

“(3) ‘Government’ means the Government of the United States and the government of the District of Columbia.

“(c) Any officer or employee of the Government summoned or requested to testify or produce information or material before Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee (hereinafter the ‘requesting body’), shall not refuse to appear on the grounds that the requested testimony, information, or material is privileged. Any such officer or employee appearing as a witness may be required to answer questions with regard to, or required to produce, any

“(1) information or material within such person’s immediate knowledge or jurisdiction; and

"(2) policy decisions that such person personally has made or implemented. If such witness asserts that the requested information or material is privileged and refuses to supply the same, such person immediately shall provide a justification for the assertion of privilege, whereupon it shall then be a question of fact for the requesting body to determine whether or not the plea of privilege is well taken. If not well taken, the witness shall be ordered to supply the requested information or material. Upon such order, if the witness continues to refuse to supply the requested information or material, such person shall be held in contempt of Congress.

"(d) Any information or material of, or under the custody or control of, any agency, officer, or employee of the Government shall be made available to any Member of the Congress, any joint committee of the Congress, any committee of either House of the Congress, any subcommittee of any such committee, or the General Accounting Office, upon written request of any such Member, committee, subcommittee, or office to the head of the agency or other officer or employee of the Government who has custody or control of such information or material. Any information or material so requested shall be furnished within fifteen days of receipt of the request unless within such time the head of the agency or other governmental authority which receives the request asserts that the information or material is privileged and provides in writing to such Member, committee, subcommittee, or office a justification for the assertion of privilege. In the case of information or material requested by a committee or subcommittee, upon receipt of a plea of privilege it shall then be a question of fact for the committee or subcommittee to determine whether or not such plea is well taken. If not well taken, the head of the agency or other governmental authority which receives the request shall be ordered to supply the requested information or material, and if such information or material is still refused, such person shall be held in contempt of Congress.

"(e) Nothing in this section shall be construed to require any officer or employee of the Government to make available to the Congress, any Member of the Congress, any joint committee of the Congress, any committee of either House of the Congress, any subcommittee of any such committee, or the General Accounting Office the nature of any advice, recommendation, or suggestion (as distinct from any form of information or material included within or forming the basis of such advice, recommendation, or suggestion) made to or by such person in connection with matters solely within the scope of such person's official duties, except to the extent that such information may be required by some other provision of law to be made available to Congress or made public.

"(f) Nothing in this section is intended to recognize or sanction a doctrine of 'executive privilege' or to permit the refusal of information or material on the grounds that such information or material constitutes 'internal working papers'."

SEC. 402. The analysis of such chapter is amended by adding the following new item: "192a. Privileged information."

TITLE V—COMMUNICATIONS MEDIA PRIVILEGE

SHORT TITLE

SEC. 501. This Title may be cited as the "Communications Media Privilege Act of 1973".

DEFINITIONS

SEC. 502. For the purpose of this Title, the term—

(1) "Federal or State proceeding" includes any proceeding or investigation before or by any Federal or State judicial, legislative, executive, or administrative body;

(2) "medium of communication" includes, but is not limited to, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system;

(3) "information" includes any written, oral or pictorial news, or other material;

(4) "published information" means any information disseminated to the public by the person from whom disclosure is sought;

(5) "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited

to, all notes, outtakes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated;

(6) "processing" includes compiling, storing, and editing of information; and

(7) "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

SEC. 503. No person shall be required to disclose in any Federal or State proceeding—

(1) the source of any published or unpublished information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or

(2) any unpublished information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

SECTION-BY-SECTION ANALYSIS

TITLE I—AMENDMENTS TO FREEDOM OF INFORMATION ACT

Sec. 101. Short title. This title, which would regulate and limit the classification of material by the Executive branch, amends the Freedom of Information Act to emphasize that the intention is to make much more information available to the public.

Sec. 102. Amends paragraph (a) (3) of the Freedom of Information Act to provide the award of attorneys' fees and court costs to individuals who show that they have been improperly denied information by an agency.

Sec. 103. Housekeeping amendments.

Sec. 104. Adds paragraphs (d) through (g) to the Freedom of Information Act.

(d) CLASSIFICATION OF INFORMATION.—

(1) States that the purpose of providing guidelines and limitations for Executive branch classification is to control the abuse of classification as it has come to be practiced. This abuse is so severe that security experts agree that somewhere between 75 and 99 percent of all current classification is unnecessary. Such examples as classification of newspaper articles and the classification of whole documents, no individual part of which is itself classified, are common. Such overclassification has been accomplished not under law, but solely on the authority of executive order. The executive order under which classification is now carried out (no. 11652) became effective June 1, 1972, with the announced purpose of bringing the classification system under rein. It has failed to do so, and many think the situation has worsened since its issuance.

This paragraph specifically states that by passing legislation governing classification the Congress would have no intention of encouraging classification or making the unauthorized disclosure of classified material a criminal offense. Classification would remain an executive *prerogative*—it would *not be mandated* by the Congress. Consequently, it would not be illegal to disclose classified matters, just as it is not now illegal. It would continue, however, to be illegal under the Espionage Act to disclose information with intent or reason to believe that it could be used to the injury of the United States. This is as it should be. To make simple disclosure a crime, without intent to injure, would be tantamount to creating an Official Secrets Act—something the United States has always avoided. So make mere disclosure a criminal offense would give any person who could use a classification stamp the authority to make criminals of other citizens. Such a law would certainly show little respect for the First Amendment.

(2) Stipulates that only one designation, "Secret Defense Data", may be used to classify information. The present use of three categories of classification—"Confidential", "Secret", and "Top Secret"—serves no useful purpose in protecting the national defense; it only inhibits the availability to the public of large volumes of information. Information either deserves protection, or it does not. This was the practice followed by the Congress in the Atomic Energy Act of 1954, the only place where classification has a sanction in law. Information to be protected is there designated "Restricted Data". The use of only one category of classification will not prevent the limited dissemination of information within

the executive branch. Paragraph (d) (3) provides for the use of appropriate routing indicators, which would be not unlike such present designations as "Eyes Only" and "Lim Dis".

The criterion of classification would be protection of the national defense against either overt or covert hostile action. The term "national defense" is chosen purposefully, rather than "national security". The latter term is much broader, including the economic condition of the United States for instance, and its use as the criterion of classification would more severely restrict the availability of information to the public. Of course no criterion should justify the use of classification to conceal incompetence, wrongdoing, etc., and this is specifically spelled out in the bill.

(3) Requires that "Secret Defense Data" will be the exclusive designation used in classification. Provides for the use of routing indicators, as explained above.

(4) Limits the authority to classify to the President and such offices within the Executive Office of the President as he designates; the heads of the Departments of State, Defense, Treasury, Justice, Commerce, and Transportation; the heads of the military departments; and the heads of the AEC, CIA, and NASA. The needless proliferation of wielders of classification stamps has had a significant effect in denying information to the public. The bill meets this problem by lodging the authority to classify in only those agencies where it is operationally necessary, and then only in the heads of the agencies and such principal deputies as they designate in writing. Only those individuals whose daily operational responsibilities require such authority will be allowed to classify, and the heads of agencies will be required to review this authority twice a year, to determine each individual's continuing "need to classify". Any individual exercising classification authority will be furnished written instructions which set the boundaries within which he may classify. The redelegation of classification authority will not be permitted, but the mere handling of classified material, in a clerical capacity, will not require the authority to classify.

(5) The heads of agencies exercising classification authority will be required quarterly to submit to the Comptroller General lists of all individuals with the authority to classify. Such lists shall also be available to the Congress. This will insure a public check on who is classifying public information.

(6) Prevents the classification of information by association. Under the present system it is common practice to classify an entire document, even though only a very small portion is actually sensitive. In some cases, a document is classified even when *no* part of it, taken separately, is classified.

(7) Requires that all classified material will clearly show: the designation "Secret Defense Data", any routing designator which may have been assigned, the office of origin, the date of origin, the name and title of the classification authority, and the date of classification. It will be further shown what part or parts of the material require protection, so that the remainder may be used without the encumbrance of classification.

(8) Allows the classification of information received from foreign governments and international organizations if unauthorized disclosure could be expected to damage the national defense or the defense of an allied government. Any such information would be available to the Congress, however, even if the foreign government or international organization had stipulated otherwise.

(9) Brings information classified by the present system under coverage of the bill.

(c) DECLASSIFICATION OF INFORMATION.—

(1) (A) Provides that information which no longer needs to be classified to protect the national defense, or which simply no longer can be protected from unauthorized disclosure, will be declassified promptly. The Pentagon Papers are a good example for both these cases. They were first kept classified unnecessarily, and then, even after they were released, not all released portions were declassified.

(B) Except as provided in paragraph (2) below, requires that information classified under the provisions of this bill will be declassified automatically at the end of two years, regardless of whether or not it was marked to show the declassification. The following points from the 1970 Report of the Defense Science Board Task Force on Secrecy are relevant:

"It is unlikely that classified information will remain secure for periods as long as 5 years, and it is more reasonable to assume that it will become known to others in periods as short as 1 year."

"... Classification of information has both negative as well as positive aspects. On the negative side, in addition to the dollar costs of operating under conditions of classification and of maintaining our information security system, classification establishes barriers between nations, creates areas of uncertainty in the public mind on policy issues, and impedes the flow of useful information within our own country as well as abroad."

"... The volume of scientific and technical information that is classified could profitably be decreased by perhaps as much as 90 percent through limiting the amount of information classified and the duration of its classification."

"... More might be gained than lost if our nation were to adopt—unilaterally, if necessary—a policy of complete openness in all areas of information..."

(C) Except as provided in paragraph (2) below, requires that information classified during the two-year period preceding the establishment of the new classification system will be declassified automatically two years from the date of its classification, unless that date is not known, in which case it will be declassified two years from the effective date of the bill.

(D) Except as provided in paragraph (2) below, requires that information classified prior to the two-year period preceding the effective date of the bill will be declassified automatically six months after the effective date.

(2) (A) Provides that the President or the head of an agency (but no one else) may assign a deferred automatic declassification date of up to two years to any information, rather than allow it to become declassified as set out in paragraphs (B), (C), or (D) above. Any such deferred declassification date would itself automatically expire in not more than two years, but it could always be deferred for another two years. In order to assign any such deferred declassification date, however, the President or head of an agency would be required to submit, in writing, to the Senate and House Committees on Government Operations and the Comptroller General a detailed justification for the continued classification. The committees, in turn, would be required to print these justifications as a public document at least annually. This process leaves the determination of whether or not information should be declassified in the hands of the agency which knows the material and circumstances best, but it assures periodic high level review and makes the Congress and the public aware that information exists, albeit in classified form. (Of course, some justifications for continued classification might themselves reveal information which should be kept secret. In this circumstance the bill provides that the justification will not be publicly printed, but will be available to the Congress.) This overall procedure also is in accord with the recommendation of the Defense Science Board Task Force on Secrecy that in each instance of classification there be set "a limit on the classification, as short as possible, which could be extended with detailed justification."

(B) Provides that any person (which would include the Congress) may bring a civil action to seek to enjoin a deferral of declassification or to order declassification on the grounds that such a deferral does not satisfy the requirements for classification, namely, protection of the national defense. In any such case, the burden would be on the President or the head of an agency to sustain his deferral. This procedure parallels the provision for judicial relief already contained in the Freedom of Information Act. It is essential if citizens are to have recourse in the face of needless governmental secrecy.

(3) Requires that the declassification of information will be made widely known through either an announcement describing the information declassified or notification of all holders of material which contains the declassified information.

(4) Provides that when material is declassified it will be so marked, showing the date of declassification and the name and title of the person who authorized the declassification. This requirement would not apply to material in storage or material to be destroyed.

(5) Provides that in cases of transferred functions or materials, the head of an agency need not have classification authority in order to declassify information if that information is under his jurisdiction.

(6) Provides that any officer or employee of the executive branch who has custody of classified material which he thinks should be declassified may recommend immediate declassification by the appropriate authority.

(f) IMPLEMENTATION.—

(1) Provides that implementing regulations shall be prescribed jointly by the head of an agency and the Comptroller General. This will provide congressional oversight of executive classification procedures.

(2) Charges the Comptroller General with monitoring executive classification procedures.

(3) Prevents the withholding of information from the Congress or federal courts on the grounds that such information is classified. Although the Executive is reluctant to admit that it withholds information from the Congress on the basis of classification, it in fact does so. There can be only two possible justifications for this executive withholding. One would be that there is no "need to know" on the part of Congress, and the other would be that in the hands of the Congress information would soon lose its confidentiality. Neither answer suffices. There is assuredly a "need to know" for Congress must legislate, and it must have facts to do so. The argument for withholding information because Congress will destroy its confidentiality also fails. In the first place, Congress handles classified information all the time without "leaking" it. Executive withholding is selective. Secondly, it is a well-established constitutional principle that the fact that a power might be abused is no argument against its existence. Every power may be abused. Thirdly, the public release of information by the Congress is an important separation-of-powers check on excessive executive secrecy.

The need to specify that classification of information will not form the basis for withholding such information from the courts arises from the recent decision of the Supreme Court in *Environmental Protection Agency v. Mink*. In that case, it was the opinion of the Court that an examination of the Freedom of Information Act and the surrounding legislative history "negates the proposition that Exemption 1 [of the Freedom of Information Act, which allows withholding of information classified pursuant to executive order] authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret . . ." Of course, the majority went on to say that ". . . in some situations, *in camera* inspection will be necessary and appropriate." But this concession is qualified by the further statement that *in camera* inspection may be ordered only after an agency first has been given the opportunity to ". . . demonstrate, by surrounding circumstances [without producing the documents], that particular documents are purely advisory and contain no separable, factual information." In the words of the majority opinion itself, an agency is ". . . entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection." The Court has in this decision adopted something less than careful judicial review of the executive's inclination to keep its secrets secret, and legislative clarification appears necessary to assure the free flow of information to the public.

Sec. 105. Exempts from the provisions of this title the classification of atomic energy information by the Atomic Energy Commission, which already is regulated by law and has not posed problems of the same order as other executive classification.

Sec. 106. Effective date.

TITLE II—CONGRESSIONAL PROTECTION

Sec. 201. Amends Part II of title 18, United States Code, by adding at the end a new chapter 239 and a new section 3791.

§ 3791. Congressional protection

(a) Provides that the courts shall have no jurisdiction to conduct criminal proceedings which relate to a legislative activity of a Member of Congress. Such an alteration of the jurisdiction of the courts—which the Congress has the undoubted power to regulate—is made necessary by the decisions in *United States v. Brewster* and *Gravel v. United States*, in which a majority of the Supreme Court held that the "Speech or Debate" clause of article I, section 6 of the Constitution does not bar grand jury investigations and criminal prosecutions against Members of Congress for deciding how to speak and vote, and for informing themselves and their constituents about maladministration and corruption in the Executive branch.

The Speech or Debate clause—which states that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place"—has historically been construed broadly by the courts, to

include much more than just speeches and debates delivered within the four walls of the Capitol. As Senator Sam Ervin has stated, it is the Congress' "First Amendment", preserving broad freedom to speak and act when Members of Congress do the people's business. The Constitution's Speech or Debate clause derives directly from a similar provision in the English Bill of Rights of 1689, which itself arose out of the case of Sir Williams, Speaker of the House of Commons. Williams had republished, after it first appeared in the Commons Journal, a report about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. During the reign of James II, Williams was charged with libel and fined £10,000 even though he had pleaded that the publication was privilege as necessary to the "counseling" and "enquiring" functions of Parliament. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one, . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament."

Flying in the face of this historical precedent, the Supreme Court in *Gravel* stated that "the English legislative privilege was not viewed as protecting republication": and while acknowledging that prior cases have read the Speech or Debate clause "broadly to effectuate its purposes," and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it," the Court severely narrowed its application by stating that:

"Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

While the *Gravel* case involved the question of protection of a Senator's aide from interrogation about republication of the Pentagon Papers, the *Brewster* case concerned the very different issue of an indictment of a former United States Senator for the solicitation and acceptance of bribes "in return for being influenced . . . in respect to his action, vote, and decision" on certain legislation. Though Senator Brewster's actions centrally involved legislative activity, the Court drew a distinction between the *performance* of a legislative act and an *agreement to perform* the same. It thus was able further to erode the protection of the Speech or Debate clause by holding that ". . . a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." Chief Justice Burger, writing for the majority, then went on to devise an apparently gratuitous distinction between political acts and legislative acts:

"It is well known, of course, that Members of Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called 'news letters' to constituents, news releases, speeches delivered outside the Congress . . . Although these are entirely legitimate activities, they are political in nature rather than legislative. . . ."

Thus, in the *Brewster* and *Gravel* decisions, the Court restrictively defined "legislative acts" and limited the scope of Speech or Debate immunity to those acts. The legislator has been left with no protective immunity from Executive branch harassments such as subpoenaing him to testify as to his confidential sources of information and prosecuting him for unpopular legislative acts on the grounds that they are improperly motivated. This danger was recognized by Justices White, Douglas, and Brennan, dissenting in *Brewster*:

"... [T]he opportunities for an executive, in whose sole discretion the decision to prosecute rests . . . to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution—precisely the evil which the Speech or Debate Clause was designed to prevent."

Similarly, Justice Brennan, writing in dissent for himself, Justice Douglas, and Justice Marshall, warned of the dangers to public dialogue posed by the majority's opinion in *Gravel*:

"Whether the Speech or Debate Clause extends to the informing function is an issue whose importance goes beyond the fate of a single Senator or Congressman. What is at stake is the right of an elected representative to inform, and the public to be informed, about matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive."

(b) (1) Provides that before a subpoena which relates to legislative activity of a Member of Congress can be issued it must be personally approved by the Attorney General. The Attorney General is also required to notify, at least 48 hours in advance of its issuance, the Member concerned and the President pro tempore of the Senate in the case of a Senator and the Speaker of the House in the case of a Representative. This procedure will assure that legislative immunity is not infringed upon without the Member or his House being aware of the government action. It also will allow time for the Member to move to quash the subpoena, as provided in subsection (c).

(2) Provides that if a Member and his House have not been notified as provided in paragraph (1), and if testimony is being taken in a criminal proceeding which relates to that Member's legislative activity, then the court will stay the proceedings and give the Member an opportunity to move to quash those subpoenas pursuant to which the testimony is being taken, as provided in subsection (c).

(c) Provides that if a subpoena is issued to anyone with respect to any activity of a Member of Congress, that Member may move to quash the subpoena on the grounds that it relates to his legislative activity, and hence is beyond the jurisdiction of the court. Upon such a motion, the subpoena in question shall be stayed and a hearing held to determine its proper disposition. The subpoena shall be quashed unless the government (1) states with particularity the information it intends to receive as the result of the issuance of the subpoena and (2) proves beyond reasonable doubt that the subpoena does not relate to the Member's legislative activity. If the government satisfies these conditions the court may order the enforcement of the subpoena, but the order shall specify as narrowly as practicable the information about which the government may inquire in order to prevent questioning concerning legislative activity.

These procedures provide Members of Congress a mechanism by which they can prevent executive inquiry into their legislative activity, either through requiring them to testify directly or through the testimony of third parties. This will prevent the abuses countenanced by the Supreme Court in *Brewster* and *Gravel*, where third party inquiry was in no way circumscribed and where protection against even direct questioning was limited to only the most narrowly conceived legislative activities.

(d) DEFINITIONS.—

(1) "Court" is defined as under section 451 of title 28.

(2) "Legislative activity" is defined generally as any activity of a Member of Congress relating to the due functioning of the legislative process and carrying out the obligations a Member of Congress owes to the Congress and his constituents. This broad language includes all constitutionally delegated responsibilities of the Congress, and is meant to encompass legislative oversight of the executive departments and the function of informing one's constituents and one's colleagues. The term is further specifically defined to include speeches, debates, and votes, whether on the floor or in committee; gathering or receipt of information for use in legislative proceedings; speeches or publications outside of Congress informing the public on matters of national or local importance; and the motives and processes by which a decision was made with respect to any of the foregoing. This definition includes several activities specifically supposed by the Supreme Court not to be part of legislative activity.

(3) "Member of Congress" is defined to mean either a present or a former Member, a protection clearly shown to be necessary by government prosecution of former Senator Brewster. Legislative integrity will not be preserved if Members are subject to executive harassment when they are no longer in office.

Sec. 202. Amends the table of chapters of part II of title 18.

TITLE III—OFFICE OF THE GENERAL COUNSEL TO THE CONGRESS

Sec. 301. Establishes a new entity within the Congress, to be known as the Office of the General Counsel to the Congress.

Sec. 302. Stipulates that the purpose of this new office will be to provide legal advice, representation, counseling, etc. to the Congress and its committees and Members in those matters relating to their official responsibilities. The services of the office could not be used on personal legal matters. The office would be required to serve all committees and Members equally, and to perform those functions set out in section 303 when requested to do so by the appropriate authority, unless directed otherwise by the House or the Senate or the Congress as a whole. This procedure will assure that each Member and committee will be able to obtain legal assistance in protecting his or its legislative prerogatives, even if the matter in question is an unpopular cause, unless there is in effect disciplining of the Member or committee by the body as a whole. This is in keeping with the constitutional provision that "Each House may determine the Rules of its Proceedings, [and] punish its Members for disorderly Behavior. . . ."

The Congress and its committees and Members are, from time to time, involved as parties litigant. This has been increasingly true in recent years, and in the 92nd Congress alone some 205 Members were directly concerned with litigation affecting Congress. Many of these cases have been private suits against Members; some, such as *Mink v. Environmental Protection Agency*, have involved efforts by Members of Congress to obtain information from the Executive; and still others, such as *United States v. Brewster*, *Gravel v. United States*, and *Doe v. McMillan*, have concerned the question of legislative immunity under the Speech or Debate clause of the Constitution. Historically, representation in such cases has been by private counsel or by the Department of Justice. In a few cases—for example, *Powell v. McCormuck*—the Congress has had its own counsel under special arrangement.

If the Congress is to preserve its independence as a separate branch of the government, it is important that it establish its own General Counsel to defend it, to compel executive compliance with the law and with requests for information, and to preserve its integrity through strong assertion of legislative immunity. The cost of retaining private counsel for these purposes is almost prohibitive, and in other ways not as satisfactory as having representation by an official of the Congress itself. The alternative of turning such matters over to the Department of Justice is not always available, as when congressional positions run counter to executive policy, but even when it is, such representation is often not particularly aggressive or enthusiastic. Each branch of the government, under the constitutional separation of powers, must ultimately discharge its responsibilities based on independent judgments, and one branch cannot and should not be dependent on the other branches for guidance and direction.

Sec. 303. Functions of the Office of the General Counsel to the Congress.

(a) Provides that upon request of the Congress, either of its Houses, or any of its committees, civil action may be commenced against any officer of the government to compel compliance with any law. For example, the Congress might wish, under this provision, to bring action against the President to force him to release impounded funds.

(b) Provides that upon request of the Congress, either of its House, any Member or any committee or subcommittee, civil action may be commenced against any officer of the government to compel compliance with any request for information. The legal assistance provided under this provision could have been used by Representative Patsy Mink and 32 other Members of the House when they sought to obtain several documents relating to the proposed underground nuclear test at Amchitka Island, Alaska. It also could be used, for instance, by the Senate or House Committee on Government Operations to challenge the assignment of a deferred declassification date, as provided by subsection (c) (2) (B) of the Freedom of Information Act, as amended by section 104 of title I of this bill.

(c) Provides that upon request of the Congress, either of its Houses, any Member, or any committee or subcommittee, the Office of General Counsel may represent any of the aforementioned for any former Member of Congress or any officer or employee of Congress in any civil or criminal action arising in connection with their official responsibilities. This provision would provide legal assistance to the many Members of Congress and the several committees against whom suits are brought. It also would have provided assistance to former Senator Daniel Brewster when he was indicted on charges of soliciting and accepting a bribe, if the Congress had so requested.

(d) Provides that upon request of the Congress, either of its Houses, any Member, or any committee or subcommittee, the Office of General Counsel may intervene as a party before any grand jury proceeding or in any civil or criminal proceeding. Under this provision Senator Mike Gravel could have received legal assistance when he moved to intervene in an action brought by aide Leonard Redberg to quash a subpoena issued by a federal grand jury convene to investigate matters relating to the public disclosure of the Pentagon Papers.

(e) Provides that upon request of the Congress, either of its Houses, or any of its committees, the Office of General Counsel may appear before any federal court as amicus curiae in cases involving the intent and meaning or constitutionality of legislation or of any action of either House. This provision would have applied, for instance, when the Senate filed an amicus brief before the Supreme Court in the *Gravel* case.

(f) Provides that the Office of General Counsel will review periodically the rules and regulations issued by the various agencies, to determine if they are authorized by the legislation under which they purport to be issued. Oversight of this type would significantly increase congressional control over the agencies which often issue regulations which substantially alter the law as enacted.

(g) Charges the Office of General Counsel with the responsibility of bringing to the attention of the Congress any matters which relate to the functions and duties of the Congress or its Members.

(h) Provides that the Office of General Counsel will furnish advice and other appropriate services in connection with its other functions.

Sec. 304. Provides that the Office will be under the direction of the General Counsel to the Congress, who will be appointed by unanimous action of the President pro tempore of the Senate, the Speaker of the House, and the majority and minority leaders of the two Houses. The General Counsel would serve for only one ten-year term, and he could be removed from office by unanimous action of the leaders.

Sec. 305. Provides that the General Counsel may appoint such staff as is required for the Office, subject to approval of the leaders. All appointments would be made solely on the basis of fitness to perform the duties of the position.

Sec. 306. Provides that compensation of the General Counsel will be at the rate of Executive level III, and that compensation of other staff will be at rates not to exceed that of Executive level V.

Sec. 307. Authorizes expenditures for the operation of the Office, in accordance with policies and procedures approved by the leaders.

Sec. 308. Provides that the Office will have the privilege of free transmission of mail.

Sec. 309. Authorization of appropriations.

TITLE IV—PRIVILEGED INFORMATION

Sec. 401. Amends Chapter G of title 2, United States Code, by adding a new section 192a.

§ 192a. Privileged Information

(a) Declares it to be the policy of the United States that any information in the possession of the Executive branch is to be made available to the Congress in order that it may discharge in an informed manner those duties and responsibilities given it by the Constitution. In 1927, a unanimous Supreme Court in *McGrain v. Daugherty*, 273 U.S. 135, 174-5, stated that:

“. . . the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which frequently is true—recourse must be had to others who possess it. . . .”

The principle of Executive accountability to Congress was asserted from the outset of the nation's history. In 1789 Congress adopted a statute stating that:

"[I]t shall be the duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office . . ."
[1 Stat. 65-66 (1789) (now 31 U.S.C. 1002)]

This provision was drafted by Alexander Hamilton himself, and the statute makes no provision for executive discretion to withhold. Not only was this a constitutional interpretation by the First Congress, but it also was approved by President Washington, who signed it. Since the First Congress, many other statutes have been passed requiring the various agencies to turn over information to the Congress upon request. But the original statute was itself at an early date applied by extension to all departments. In 1854 Attorney General Cushing furnished this advice to the President:

"By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General."

(b) Defines the terms "agency", "employee", and "Government" in such a way as to impose the requirements of the section upon all individuals within the Executive branch, including advisors to the President.

(c) Stipulates that any officer or employee of the Government summoned or requested to testify or produce information before the Congress or any of its committees may not refuse to appear on the grounds that the requested testimony or information is privileged. Although it is almost undeniable that some information will be privileged, the privilege clearly runs to *information* and not to individuals. Accordingly, if an employee of the Executive branch is requested to testify, even if he plans to claim that the requested testimony is privileged, he testifies, even if he plans to claim that the requested testimony is privileged, he should appear to explain the reasons for his refusal. There is no reason to immunize the Executive from the burden of justifying its failure to testify. The Congress is entitled to at least an appearance.

This subsection further stipulates that any individual appearing as a witness may be questioned concerning (1) information within his immediate knowledge or jurisdiction and (2) policy decisions that he personally made or implemented. This procedure will assure that the Congress gets the information it needs, while at the same time preventing abuse of lesser officials by congressional committees. It is somewhat unseemly, not to say unproductive, for Congress to badger minor bureaucrats about matters over which they have no real control.

If a witness is questioned about matters within his authority, and he refuses to answer and asserts that the information requested is privileged, he will be required to justify his claim of privilege, and it shall then be a question of fact for the committee to determine whether or not the plea of privilege is well taken. There are several grounds on which a claim of privilege might be asserted, and which the committee would need to evaluate in the individual case. For example: (a) the information is made confidential by statute (b) the information is solely of the nature of advice to a superior (c) the information concerns pending litigation and must be protected to assure an individual his right of privacy. Each of these pleas of privilege, which might be considered well taken in a given instance, have frequently been included under the rubric "executive privilege", but a claim of executive privilege should not be accepted in such unrefined form.

Executive privilege—the alleged power of the President to withhold information, the disclosure of which he feels would impede the performance of his constitutional responsibilities—supposedly has its constitutional basis in article II section 3, where the President is charged with seeing that the laws are faithfully executed. But this can be no grounds for refusing information to the Congress, which, as shown above, has both a constitutional and a statutory right to require whatever information it needs to make those laws which shall be "necessary and proper" for carrying out its responsibilities. As early as 1838 the Supreme Court asserted in *Kendall v. United States* that: "To contend that the obligation imposed upon the president to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

A congressional request for information is too important to be blocked even by a refusal from the President. For this reason, it would be a mistake simply to require that the President personally direct an assertion of the privilege, as some have suggested. Although it is best that an assertion of privileged communication with the President, for instance, not be made without presidential approval, it would be a grave error to concede that the President has any such uncontrolled discretion to deny the Congress information. This is not a decision which can be made by the Executive alone. In a case in which the Congress has legitimate authority, but in which the President contends that disclosure would hinder the discharge of his constitutional powers, recourse must be had to the courts.

Subsection (c) provides this recourse by requiring that if a witness is ordered by a committee to comply with a request for information even after he has asserted the information to be privileged, he may be held in contempt if he still continues to refuse. If a standoff of this sort were reached, there would be two ways to get the matter before the court. One would be for the Congress to punish the contempt by having the Sergeant at Arms seize the offender and imprison him in the common jail of the District of Columbia or the guardroom of the Capitol Police. The case would then be brought before the court through the issuance of a writ of habeas corpus. Alternatively, under section 303(b) of title III of this bill, the committee could direct the General Counsel to the Congress to commence civil action against the recalcitrant official to compel compliance with the request for information. That the court would have authority to decide between the claims of the contending parties in such a circumstance is fairly well established. In *United States v. Reynolds* in 1953, the Supreme Court asserted that executive privilege was "not to be lightly invoked," that "the Court itself must determine whether the circumstances are appropriate for the claim of privilege," and that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." In a much earlier case, *United States v. Burr*, Chief Justice Marshall ruled in 1807 that:

"That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted. . . .

"The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on."

The Chief Justice did in fact require President Jefferson to produce the letter in question in this case.

(d) This subsection is the same as (c) above, except that it pertains to written requests for information rather than oral testimony, and it includes the individual Members of Congress and the General Accounting Office in its provisions as well as the committees of Congress. Individual Members and the GAO would not, however, have the contempt power.

(e) Provides that this section cannot be used as authority to require any member of the Executive branch to make available to the Congress the nature of any advice, recommendation, or suggestion made to or by such person in connection with matters solely within the scope of such person's official duties. Just as aides to Members of Congress and clerks for judges should not be required to reveal the advice they give their employers, so members of the Executive branch should not be so compelled. This exemption does not include, however, any information or material included within or forming the basis of such advice.

(f) Disclaims any intention of sanctioning a doctrine of executive privilege or permitting the refusal of information on the grounds that it constitutes "internal working papers".

Sec 402. Amends the chapter analysis to include this new section.

TITLE V—COMMUNICATIONS MEDIA PRIVILEGE

Sec. 501. Short title.

Sec. 502. Definitions.

(1) "Federal or State proceeding" is defined to include proceedings or investigations before judicial, legislative, executive, and administrative bodies. State, as well as federal, proceedings are included because most of the current controversy over press freedom has arisen at the State level, and the law in even those States which have so-called "shield laws" has not been adequate to protect newsmen.

(2) "Medium of communication" is defined to include books as well as more traditional sources of news, and includes electronic as well as print media.

(3) "Information" is defined to include oral and pictorial, as well as written, news.

(4) "Published information" is defined to include all information disseminated to the public by the person from whom disclosure is sought.

(5) "Unpublished information" is defined to include all information not disseminated to the public by the person from whom disclosure is sought, regardless of whether published information based upon such material has been disseminated.

(6) "Processing" is defined to include compiling, storing, and editing of information.

(7) "Person" is defined to include partnerships, corporations, associations, etc. as well as individuals.

Sec. 503. Stipulates that no person will be required to disclose in any federal or State proceeding (1) the source of any published or unpublished information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or (2) any unpublished information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

This section grants the unqualified privilege from disclosure recommended by the American Newspaper Publishers Association. Legislation to provide this immunity is required in face of the 5 to 4 Supreme Court decision in *United States v. Caldwell* that the First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. As Justice Stewart stated, writing for the minority:

"The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. . . . The Court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."

If newsmen are required to reveal their confidential sources and information, press informants will "dry up", and the public will receive nothing but the official line on government actions. Similarly, inside coverage of crime and unpopular organizations and ideas will also be severely diminished.

It has been argued that the proposed unqualified immunity should not apply when a newsman is the defendant in a libel action. However, because of the decision in *New York Times Company v. Sullivan*, in which the Supreme Court ruled that in libel actions brought by public officials and public figures recovery can be had for a defamatory falsehood only if it is published with actual malice, there is almost no possibility of succeeding in such a case against a newsman, so little is lost by making the privilege absolute. On the other hand, to allow libel suits against newsmen when they are otherwise protected from government intimidation might simply subject them to harassment through frequent libel actions, even though they in all probability would not be successful.

Senator GRAVEL. The role of Congress. Precisely the role of Congress is one of providing information. The right of the public to be informed about the workings of Government is the point at issue. A dialogue between the Congress and people is a necessary element in representative Government. Legislative immunity—the central focus of these hearings—is, as Sam Ervin has said, the Congress' first amendment.

The second point accompanying the informing function is the adversary function. Congress is the advocate for the people against the Government. This was the concept initially designed by, I think the real genius of our forefathers. To be a good advocate, the Congress must be not only informed, but also free of fear of retribution in using that information.

The essential item of importance, of course, is legislative immunity. In gathering and disclosing information, the Congress must be protected from harassment and intimidation. The protection needed is immunity from criminal prosecution for legislative acts, and of course, I agree with Senator Ervin in that regard.

The issue is one of separation of powers. Immunity from executive prosecution does not mean Members of Congress are answerable to no one. During these hearings we have talked in terms of being disciplined by our House, the House that we serve in. But more importantly than that, we are disciplined by the people who elect us. And we had a case in point that I used yesterday, where a colleague of ours was receiving a substantial sum of income from a firm in California. It was apparent to all that he was really doing nothing to earn that income. There was nothing illegal in this. He received the money; he reported the income and all that, but the electorate in its wisdom felt he did nothing to earn that money; it just didn't look right, and so this became the central issue in his campaign, and he was defeated for reelection. I think this is a classic example where the people themselves come forward and discipline the people they hire, people who represent them.

Immunity should not extend to civil actions against Members of Congress. If the Congress is the people's advocate, it does not need protection from the citizens themselves. That, of course, is where the important discipline takes place.

I think there is a need for a comprehensive approach. Congress must act to restore its constitutionally granted legislative immunity, which has been eroded by recent court decisions and executive action and, of course, our technological developments.

Immunity is fundamental to the informing and adversary roles of Congress, but Congress also must have the tools with which to gather information and make it known to the public.

Congress must control excessive secrecy by establishing guidelines and limitations for classification and declassification. This does not mean mandating secrecy itself, which I think is the situation that exists today.

Congress must put a stop to the abuse of executive privilege. While the adviser relationship should be kept sacrosanct, it should never be used to keep information from the Congress. It should never be used to keep information from Congress, by bureaucrats within the executive or by the President himself.

Congress should establish its own general counsel to preserve its own immunity, defend its Members, and act aggressively to halt executive usurpation of power. This is a very key one. Of course, we do not have this tool at this moment.

Congress must grant newsmen immunity from disclosure of information and sources. A free press will assist the Congress in informing the people, and it will keep the Congress itself honest and the true advocate of the people.

Going through the sweep of the legislation, title I leaves classification as an executive prerogative. I underscore the word "prerogative." It should be no more than that. And we must recognize the need to establish guidelines and limitations to avoid excessive secrecy, which is the extreme situation that exists today.

My bill does not make it illegal to disclose classified material. It therefore does not establish an official secrets act, which would require criminal sanctions for the mere dissemination of certain information, regardless of whether or not it would be harmful to the country.

I use this example many times in talks around the country: If I had top secret documents today, I could pass them around the room and would not be violating any law. And I think the Senator recalls the discussion we had in the Senate in secret session—the record of which was subsequently made public—when extensive reference was made to the law that I had broken, and Senator Fulbright stood up and asked someone to indicate what law that was. I had broken no law in the release of the Pentagon papers, nor had Daniel Ellsberg. It is a subjective determination, a truly moral determination as to whether or not it is right or it is wrong. We have a very good piece of legislation on the books—the Espionage Act—which I think defined the matter extremely well: that is, in order to commit treason one must want to commit treason. We have cases in point with Burton K. Wheeler and Mr. Sandys, in the British Parliament, that indicate conclusively the workability of this approach. Accidents will happen as long as you deal with human beings. But there can be no recourse to an official secrets act type of philosophy. It will not work. It will become a tool to hold power, obtain power; and oppress others. Tragically, I think our Nation is further along down this path than most realize.

Also, title I of my bill stipulates only one classification category. This, of course, is just to clean up. We go into great detail how to legislate, how to clean up the morass that exists in the classification system of the executive. That classification designation would be "Secret Defense Data." This is the practice followed by Congress in the Atomic Energy Act—the only place, mind you, where classification is sanctioned by law. Its existence in any other area is merely the usurpation of powers that are not based in law but only Executive orders. The last I heard an Executive order is not a law. We make the law, not the executive.

That criterion of classification would be protection of the national defense against either overt or covert hostile action.

To give you another example, if I had information that was not classified, but I knew it to be detrimental to my Nation, and if I released that information, obviously I would be doing something to hurt my country and that would be treasonous. Under my criteria such a person could be punished, because it would be reasonably a commonsense view that the person had done something quite wrong to his country.

This title I would limit the number of agencies which could classify and would lodge the authority to classify in the hands of a head of an agency and his principal deputies. I think we are operating under the misapprehension—as a result of the recent Executive order which is a product of the Pentagon papers—that a great deal has been done to clean the classification process, to rid it of its abuses. Actually, it has been the opposite. What we have done is let the people who are involved in classification determine the implementation of classification. We have obviously compounded the error that existed before, and instituted a system even more sophisticated than the one that existed then.

Title I also requires that all classified material show who classified it. This of course is vital to a system of accountability, and to provide

for declassification of material which is no longer needed or cannot be protected.

My bill requires declassification after 2 years unless a deferred automatic declassification date—of not to exceed 2 years—is assigned by the President or the head of an agency.

If a deferred declassification date is assigned, a detailed justification for the continued classification must be submitted to the Senate and House Committees on Government Operations and to the Comptroller General. The committees would be required to print these justifications as a public document, unless they themselves reveal information which must be kept secret.

Any citizen may challenge in courts a deferral of declassification on the grounds that the information no longer warrants protection in the interest of national defense. The key operative point here is that the burden would be on the agency to sustain its classification, and not on the people.

Title I prevents the withholding of information from the Congress or Federal courts on the grounds of classification.

Congress has a "need to know" in order to legislate, and the claim that Congress cannot be trusted with confidential matters is specious. The Congress handles classified information all the time without "leaking" it. Executive withholding is selective. In fact, the Congress is the only branch of Government which the Constitution specifically mentions in regard to secrecy—it is allowed to keep its Journal secret in certain circumstances.

And I can't help but note that this morning Admiral Moorer was talking about certain facets of the Soviet defense system—information which could conceivably be classified. But who made the determination whether or not it was good to release that information which was very negative and very positive to an increased appropriation for military defense? Who made that decision as to give that information out? It was an appointed person, not an elected official who is responsible to the electorate.

Finally, it is a well established constitutional principle that the fact that a power might be abused is no argument against its existence. That of course is what many Members are saying—something might go wrong; therefore, let's not do it. Under that approach, obviously we have no freedom. With freedom goes the responsibility and the ability to abuse freedom.

The need to specify that classification will not form the basis for withholding information from the courts arises from the recent decision of the Supreme Court in *Environmental Protection Agency v. Representative Mink*, and she will be testifying on this matter later.

Title II, congressional protection, provides that the courts shall have no jurisdiction to conduct criminal proceedings which relate to a legislative activity of a Member of Congress. This is necessary in light of the *Brewster* and *Gravel* decisions, which severely limited the speech or debate immunity from questioning "in any other place."

Legislative activity is defined generally as any activity of a Member of Congress relating to due functioning of the legislative process. I think we can all appreciate what is involved here, so I will pass over that and make the full definition available to the chairman and to the committee. In fact, I would like to leave that information for your

own personal reading, because I think it has been covered to some degree by Senator Ervin.

I would like to touch on title III, though, which contains a concept that has not yet been covered before the committee. That is the concept of having a general counsel, which I think is very vital. In fact it would have been useful to me in my efforts had one been available.

This title establishes an Office of General Counsel to the Congress to provide legal advice, representation, and counseling to the Congress and its committees and Members in those matters relating to their official responsibilities. Any Member or committee would be served by the Office, with no questions asked, unless directed otherwise by the House or the Senate or the Congress as a whole. In other words, help would be available unless there were, in effect, disciplining by the body as a whole.

The Office would be under the direction of the General Counsel to the Congress, who would be appointed for one 10-year term by unanimous action of the President pro tempore of the Senate, the Speaker of the House, and the majority and minority leaders of the two Houses.

Functions of the Office would include:

(1) Commencing civil action against officers of the Government to compel compliance with the law;

(2) Commencing civil action to compel compliance with a request for information;

(3) Representing Members, officers, and employees of Congress in civil or criminal action arising in connection with their official responsibilities;

(4) Intervening in behalf of a Member of Congress to quash a subpoena in order to protect legislative immunity;

This is something that would have been done automatically to protect the prerogatives of Congress, rather than having been done by chance by actions in the recent case.

(5) Appearing as *amicus curiae* in cases involving the intent and meaning or constitutionality of legislation.

This would be a matter of course that would take place because we would have proper counsel.

(6) Reviewing the rules and regulations—which is something that really is only done through the oversight activity of the committees, and not done very well in totality—reviewing the rules and regulations issued by agencies to determine if they are authorized by the legislation under which they purport to be issued.

One interesting facet is, of course, I am not an attorney, and some other Members of Congress are not attorneys. Obviously most of the Members, as a profession, are attorneys, but I think it is—

Chairman METCALF. It isn't necessarily good or bad.

Senator GRAVEL. Sometimes I think it is good, it adds a different approach. I think that approach is very important.

Not being an attorney, there are many times and particularly as was the case with this case, that I wish I had had an attorney that would have been paid for by the Congress, rather than paid by solicitation to the public.

The fourth title involves privileged information, which is the challenge we now face from the executive and that I think is very, very important. I hope that legislation will not be passed that will not encompass this.

This title declares that it is the policy of the United States that any information in the possession of the executive branch is to be made available to the Congress. That is *any* information.

It stipulates that any officer or employee of the Government—including advisors to the President—summoned or requested to testify or produce information before Congress may not refuse to appear on the grounds that the requested testimony or information is privileged. Some information will be privileged, but the privilege clearly runs to *information* and not to individuals, which is the point made by Senator Fulbright.

This title provides that a witness may be questioned only concerning (1) information within his immediate knowledge or jurisdiction, and (2) policy decisions that he personally made or implemented. This would, and I think should, protect lesser officials from unnecessary badgering by Congress. It also will protect the confidential advisor relationship at all levels, not just the Presidential level.

Any witness will have to justify a claim of privilege, and it shall then be a question of fact for the committee to determine whether or not the plea of privilege is well taken. If the committee decides that it is not well taken, but the witness still refuses to comply with the request for information, the witness would then be in contempt of Congress.

My bill disclaims any intention of sanctioning a doctrine of executive privilege. There is no such doctrine. This is a fabrication by the executive in an evolutionary fashion, not based on anything in the Constitution. It would be a mistake simply to require that the President personally direct an assertion of the privilege, as some have suggested.

I would like to underscore this point, because I think it is at variance with what others have said. And that is again, it would be a mistake for the Congress, when we deal with this legislation, to simply require the President himself to direct an assertion of privilege. That is no different than what we have today. We in Congress hold the office of Presidency in great awe. If we let this item slip through, we will have failed to close the floodgates, and it won't make any difference with the rest of the law that we pass, if this item is the one that we have not focused our attention on. The President, himself, has no right in personal privilege to withhold information from us, the policymakers of the Nation. We have a responsibility every bit as important as he has. The figures tell the whole story—there are only 537 humans being elected to run this country, 537—535 are in the Congress and two are in the executive.

Now, anybody who knows human nature and the exigencies of human life has to realize that the President and Vice President, but primarily the President—who is the top of this pyramid of millions of people performing services or activities in governmental action—that he is not aware of 99.9 percent of all the activity that takes place. He is a human being. There are so many hours in the day, and he receives a distillation of information. I thought the point was well made by Senator Fulbright, that he is the most protected person in the

world, and what he receives is the most distilled information in the world. And for us to assume that the prerogative of that privilege should rest with him is foolhardy, because it can't humanly rest with him. It rests with the entire pyramid. We have essentially a Government that operates through bureaucracy, and by individuals who have no responsibility to the people that they are supposed to be working for. The people themselves have no way to get to them and make them responsive—you are on your way to an autocratic system.

The only vestige of representative government left is the Congress, and you gentlemen know as well as I how this operates—the quid pro quos, the entendres, the whole attitude of “get along.” You go along, and if you choose not to, then you turn to your constituents, you turn to the problem and look at it and say, “There is nothing I could do about it.” That becomes a very frustrating activity. That is the situation we are in today. Will that situation remain? I found it interesting that Senator Fulbright pointed out the fact we have no guarantee that our system of representative government will continue. The trend of this in the world is in the exact opposite direction. Why should we be so arrogant to think we will not be visited by disaster? And we may well have charted that course already unknowingly.

The last title of my bill deals with communication, and I think it is a subject that has been highly worked over by the industry itself, by the fourth estate, because they are so deeply involved in it. I think it is every bit as important as our legislative immunity and vice versa. Without it we can't have a system of representative government.

Thank you, Mr. Chairman.

Chairman METCALF. Senator Gravel, you have been awfully patient in waiting for your appearance. Would you consent as a member of this committee to let us submit questions in writing for your response so that we can meet with a couple of our other guests, especially Professor Cella. He is here and waiting, and, as you know, we both have a rather strenuous day on the floor this afternoon.

Senator GRAVEL. I would be happy to.

Representative BROOKS. It is a splendid suggestion.

Chairman METCALF. Thank you very much, Mike. It was a splendid statement and both the statement and the material you have submitted for the record will be most helpful to us.

Professor Cella, I am delighted to have you here this morning.

Before I call on you, however, may I put Congressman Podell's statement in the record. He was supposed to be here and be the next witness. He has been unable to meet with us this morning, so his statement will be in the record.

[The prepared statement of Representative Podell follows:]

STATEMENT OF REPRESENTATIVE BERTRAM L. PODELL, A MEMBER OF CONGRESS FROM
NEW YORK

Members of Congress are charged by the Constitution with the task of legislating. In order to fulfill this function, we must be able to obtain information, and make that information known to our colleagues and to the public. To this end, Article I, section 6 provides that Members of Congress shall not be questioned regarding their communications made in either House.

The Constitution provides that the three branches of the Government shall be equal, with none subservient to either of the others. This is the basis for the claim of executive privilege. It is the reason why Federal judges have life tenure, and why their compensation may not be diminished during their continuance in

office. It is also the reason why Members of Congress must be immune to questioning regarding the fulfillment of their legislative function.

Members must also be free to communicate with their constituents. In order to represent the inhabitants of our States or districts, we must be able to ascertain the views of the public. Woodrow Wilson said: "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress has and uses every means of acquainting itself with the acts and the disposition of the administrative agents of the Government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public opinion."

A determination that Members of Congress may be called to account in the courts of law regarding matters which were the subject of their constitutional duties is a determination that the Congress is inferior to its two supposedly coequal branches of Government. This is a subversion of the Constitution. At a time when the Congress is seeing its constitutional mandate challenged by the executive, in the form of impoundments, and challenged by the judiciary, in the form of the Proposed Uniform Rules of Evidence, it is essential that the Congress not let its constitutional authority be further weakened, particularly on a matter so explicitly enumerated in the Constitution as the legislative privilege.

If Members are not free to investigate, if we are not free to speak, and if we are not free to act in fulfillment of our constitutional duties, the Congress of the United States will be unable to function. Legislation would be not only useless, but dangerous, if it were not based on a determination of the needs and wishes of the public.

James Madison wrote: "No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. . . . It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents."

If Members can't research the issues and make known their findings, they will serve no purpose. Without a strong, functioning Congress, instead of a democracy we will have Government by executive fiat and court decree.

There is an inherent friction between the three branches of our Government. It is the function of the President, in his capacity as chief executive, to administer the laws and treaties of the United States. It is also his function to formulate the policies of the Government. It is the function of the judiciary to decide cases and controversies, and to interpret the Constitution. It is the responsibility of the Congress to make laws, and, in the case of the Senate, to pass on appointments and treaties. These different functions necessarily conflict. The courts may decide that a law exceeds the permissible limits of the Constitution. The legislature may feel that the courts were in error, and pass corrective legislation. The Congress may disagree with the President's policy determination, and refuse to consent to an appointment or treaty. The President may feel that Congress was in error in passing certain legislation, and veto it accordingly.

This is the natural function of the different branches of the government. It is the formula established by the Constitution. But what was not intended by the Framers was the possibility that one branch of the Government might be called to account by one of the other two.

The Constitution explicitly grants immunity to Members of Congress in the performance of their duties. However, executive privilege, which has been claimed with increasing frequency, is nowhere enumerated. In fact, in the trial of Aaron Burr, Chief Justice Marshall ruled: "That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession is not controverted."

Congress has allowed its constitutional obligation to investigate and inform to be eroded by recognizing an executive privilege. Perhaps such a privilege is advisable, under extraordinary circumstances. But if this is to be recognized, certainly legislative privilege, which is Constitutionally mandated, must also be respected.

The Members of Congress have taken an oath to "support and defend the Constitution of the United States." Legislative immunity is a part of the Constitution. We cannot support one without the other.

Chairman METCALF. We are delighted to have you here. We are pleased to have a practicing attorney before us. We have had a Supreme Court Justice and a whole lot of attorneys, such as the chairman of the committee, who have been out of practice for a long time, and we are happy to have you here. We are looking forward to your statement and to the presentation you are going to make.

STATEMENT OF PROF. ALEXANDER J. CELLA, ASSOCIATE PROFESSOR OF LAW, SUFFOLK UNIVERSITY, BOSTON, MASS.

Mr. CELLA. Thank you, Senator Metcalf, Vice Chairman Brooks, and Senator Gravel.

Chairman METCALF. You have a law review article on this subject matter.

Mr. CELLA. Yes, I do, Senator. Actually, the article goes back prior to the *Brewster* and *Gravel* cases. The article was first written back in 1968, shortly after the *Johnson* decision.

I might say, Mr. Metcalf and members of the committee, I consider it a great honor and privilege to come here today and be invited by this committee to appear at these hearings. I won't take the trouble to read my statement to the committee. Perhaps I can most assist if I summarize briefly some of the major points in the statement and then get to whatever questions the committee may wish to put to me.

PREPARED STATEMENT OF PROFESSOR ALEXANDER J. CELLA

Mr. Chairman and Members of the Joint Committee on Congressional Operations of the United States Congress, I deeply appreciate the opportunity to appear before you this morning to discuss with you the legislative role of the Congress in gathering and disclosing information.

My presentation will concern itself primarily with an examination of the doctrine of legislative privilege for speech or debate as set forth in Article I, Section 6 of the U.S. Constitution in the light of the two decisions of the U.S. Supreme Court last June in *United States v. Brewster*, 408 U.S. 511, and *Gravel v. United States*, 408 U.S. 606.

In recent months, much concern has been demonstrated—and properly so—about striking the proper balance of power between the Chief Executive and the Congress. The continuing struggle of Congress to reassert and reclaim its powers in the area of foreign policy and war-making, in the appropriation and expenditure of public funds, and in the compulsory appearance and questioning of the executive branch officials have occupied the time, attention, and energies not only of the Congress itself, but of the American people generally. Yet, as important as all of these areas of continuing controversy are, and have been, to the preservation of a healthy, vibrant constitutional democracy based upon a system of separation of powers, they represent in a very real sense minor skirmishes when contrasted with the major assault made upon congressional power and our system of separation of powers by the U.S. Supreme Court in its *Brewster* and *Gravel* decisions.

Without minimizing the importance and significance of some of the more glamorous and newsworthy confrontations that have been building up between the Congress and the Chief Executive, I think it is fair to say that the far less glamorous, far less attention gathering work of your Joint Committee on Congressional Operations in these historic hearings which you are now holding is

likely to be far more significant in its efforts to preserve the powers of Congress and to retain a viable and effective system of separation of powers. And I say this because of my firm conviction that whatever the ultimate resolution of some of the present controversies and confrontations between the Congress and the Chief Executive, somehow we will muddle through and our system of government will survive because to a greater or lesser degree they all involve the question of whether the Congress or the Chief Executive shall have more or less power. In a sense, they are recurrent aspects of the quantitative struggle for power which was built into the very doctrine of separation of powers by the Founding Fathers.

But the issues raised by—and the implications arising out of—the *Brewster* and *Gravel* decisions represent a fundamental qualitative judicial challenge to the continued existence of any meaningful doctrine of separation of powers. In the light of the *Brewster* and *Gravel* decisions, the question is not whether Congress will continue to function with drastically diminished powers, but the more profound question of whether Congress can continue to function at all—at least in any manner which even begins to approximate its historic role and constitutionally assigned mission in the past.

The enormity of the judicial assault upon the functioning of the legislative process made by the *Brewster* and *Gravel* cases essentially derives from the U.S. Supreme Court's boldly reaching out in those decisions to enunciate for the first time a distinction between a "legislative" act entitled to the claim of legislative privilege under article I, section 6 and a "political" act not entitled to the claim of legislative privilege under article I, section 6.

In the *Brewster* case, the U.S. Supreme Court said:

"It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded of the Speech or Debate Clause."

In the *Gravel* case, the U.S. Supreme Court said:

"That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity."

* * * * *

"Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Apart from the arrogance and effrontery involved in the judicial branch boldly and unashamedly dictating to a constitutionally coordinate and coequal branch of government—the legislature—for the first time the precise nature of the legislative function, two other important aspects of this fundamental judicial distinction between "legislative" and "political" acts should not be overlooked:

(1) The distinction is arbitrary, unreasonable, unrealistic, and unworkable; and

(2) The distinction is a judicial stratagem for narrowly restricting and tightly circumscribing the area of protected activities constitutionally permissible to members and employees of the legislature.

The essential misconception which pervades the judicial distinction between "legislative" and "political" acts is the failure to recognize that in a constitutional democracy where legislators are elected by the people and must eventually

return to the people to give an account of their stewardship in order to continue to serve, every act of a legislator is in a profound sense a political act—that is to say, part of the continuing, never-ending struggle of the legislator to gain, exercise, and retain government power.

The U.S. Supreme Court in its *Brewster* and *Gravel* decisions would narrowly construe the speech or debate clause of article I, section 6 to apply to the actual proceedings on the floor of the Congress or in committees—although even here, these “legislative” activities are not fully protected by the language and implications of its decisions. Such activities are presumably of a higher order of legitimacy—and therefore entitled to some measure of constitutional protection—than are the purely “political” acts of a legislator in servicing his constituents or in issuing a press release informing his constituents of his position on some pending issue. Under this distinction, if a legislator prepares a speech or a statement and delivers it on the floor or in committee, he is presumably entitled to the claim of legislative privilege and is immune from inquiry and prosecution. If, after having prepared the speech or statement, he chooses to deliver it outside of the halls of Congress or the committee room, he is not entitled to the claim of legislative privilege because that same speech or statement is no longer “legislative,” but has by virtue of the geographical place of delivery alone, now become “political”. The contents of the speech are the same and have not been altered, but the mere physical place of delivery apparently now underlies the U.S. Supreme Court’s determination of whether legislative immunity shall attach.

And, yet, does the mere fact that the legislator chooses to deliver the speech or the statement he has prepared either on the floor of the legislature or in committee in reality make that speech or statement any less “political”? Apart from whatever contribution its intellectual content may make to the legislative process, is it not part of the continuing never-ending struggle of the legislator to gain, exercise, and retain governmental power—that is to say, “political”? And, are there not in fact speeches made on the floor or statements delivered in committee primarily designed to enable the legislator to put his best foot forward, to take a position which he hopes will favorably impress his constituents? No inveterate reader of the Congressional Record can fail to realize that oftentimes speeches, or statements, or articles, or editorials are made or inserted not solely or primarily for the enlightenment of a legislator’s colleagues, or for their intellectual contribution to the smoother functioning of the legislative process, but rather for more mundane, practical, “political” reasons. Yet, regardless of how crassly and blatantly “political” these matters may be, regardless of how much they may be designed purely and simply to curry favor with constituents or selected interest groups, the mere fact that the legislator acts on the floor in the judgment of the U.S. Supreme Court transmutes them in a glorious alchemy from “political” to “legislative” acts, and thus entitles the legislator to the claim of legislative privilege for their commission.

In my judgment, the U.S. Supreme Court’s distinction between “legislative” and “political” acts is of no conceptual value and practical utility. Rooted as it is in geography and physical location, the House floor or the Committee rooms, it is totally unworkable even within its own terms and frame of reference since it completely overlooks the fact that a legislator may—and often does—make a major “legislative” contribution—a contribution to the functioning of the legislative process—outside the halls of Congress and that he may—and often does—take advantage of the “legislative” process as narrowly construed by the Court—i.e., the floor of the legislature and the committee room—for his major “political” purposes. The U.S. Supreme Court has attempted to enunciate a fundamental, qualitative difference in various kinds of activities carried on and performed by legislators—and to establish a general test for determining protected from unprotected, or privileged from unprivileged acts. Apart from its practical unworkability and conceptual uselessness, the attempted distinction reveals, a surprising lack of understanding, sympathy, and appreciation of the realities of the modern legislative process. For in the overly rationalistic conception of the purely legislative process which the Court is advancing, the only thing that really counts is what happens on the floor or in committee—or, as the Court said in *Gravel*, “speech or debate in either House, and . . . other matters . . . (as) an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation . . .”

In the excessively rationalistic and highly simplistic view of the pure legislative process espoused by the Court, what is the conception of the pure legislator

that emerges? Wherein lies pure legislative virtue? The pure legislator best performs his purely legislative duty by eschewing all "political" considerations—all those admittedly "legitimate" activities which are "political" in nature—and devoting himself to speech and debate on the floor and in committee. In this view, the pure legislator lives in a world made up entirely of speeches or debates. He spends his time shuffling from the floor to the committee room and back again, in preparing for the floor or for the committee, and, presumably, if not actively participating himself, in listening to the speeches and debate of his colleagues. Anything not directly related to this pure process of legislation is not really "legislative" in the eyes of a majority of the Court in *Brewster* and *Gravel*. Accordingly, any other activity—while "legitimate" is, nonetheless, obviously nonlegislative and, therefore, banished beyond the pale of constitutional protection.

The dream world of the pure legislative process fantasized by the Supreme Court has probably never existed in our history. It more closely approximates a bad introductory high school civics textbook version of the legislative process. It certainly does not correspond to the realities of the legislative process in the U.S. Congress in the last third of the 20th century, as any member of the Congress, or student of the Congress, may readily attest. Nor does it even provide a particularly useful model to endeavor to emulate or to bring into being. But it does help us to understand and see in perspective the profound inroads into the realities of the legislative process in contemporary society which the Court has made through the introduction of a distinction which is deliberately designed to remove from constitutional protection vast areas of normal, legitimate, and, in my view, highly desirable legislative activities.

I would argue that if the constitutional privilege of legislative immunity as contained in article I, section 6 is to have any real value in performing its historic and constitutionally assigned function of protecting legislators in the discharge of their constitutional responsibilities from a hostile executive and judiciary, then the legislative process itself must be broadly construed to include every act, directly or indirectly, relating to the operation and conduct of the legislative process.

I would completely reject the position that it is either possible or desirable to differentiate between purely "legislative" acts and "political" acts.

I would urge that anything less than an absolute, unyielding privilege, broadly and liberally construed, is of little value in preserving the independence of the legislative branch and the separation of powers generally.

In more specific terms, let me make my position clear: I believe that the legislature, and the legislature alone, should be the sole and exclusive judge of the wrongs and transgressions of its members for acts in any way related to the legislative process. Any other position, it seems to me, necessarily leads to a breakdown in the separation of powers by permitting the executive and the judiciary to make determinations and judgments which they are ill-equipped to make, and, in any event, ought not to be permitted to make.

Now it ought to be recognized that in taking my stand for the construction of the legislative privilege or immunity in these absolutist terms, I am, of course, taking a position which is even broader than the scope of the constitutional privilege which Justice Harlan speaking for the Court in *United States v. Johnson*, 383 U.S. 169, or the dissenters in *Brewster* and *Gravel* would recognize. All of the Justices have, it seems, abandoned the view that the mediating or intervening function of the legislator—that is, the legislator interceding with executive officials, departments, or agencies on behalf of constituents with problems—is entitled to constitutional recognition and protection. Yet, while this function has often been disparagingly and demeaningly referred to as "the errand boy function" of Congress, and presumably, therefore, not a proper role to be performed by a legislator, I am persuaded that it is one of the most useful and worthwhile legislative functions that can be performed—and that it can, and often does, make a great contribution to the legislative process. For in these days of vast, highly impersonal bureaucratic structure, one of the most effective ways in which a member of Congress can truly come to understand the ways in which laws he has voted for—the programs which have been established—are in fact working is through servicing the bureaucratic complaints and dealing with the personal problems called directly to his attention by his constituents. The knowledge and insights so derived can have a vital effect on his legislative judgments in the future. He can acquire invaluable knowledge and information about statutory deficiencies or improperly administered programs. He can learn what needs to be

done to make the statute or the program work. In the final analysis, it is those directly affected by the operation of the laws which the legislator has helped to pass who know best where the shoe pinches—and by dealing directly with citizen complaints, by attempting to resolve citizen problems, through mediation, intervention, or intercession with appropriate Executive officials, departments, or agencies, the legislator readily acquires first-hand knowledge and information which cannot oftentimes be otherwise acquired.

Apart from the inclusion of the mediating function in my conception of the proper scope of legislative privilege under article I, section 6, I would argue that the most immediate practical consequence of the U.S. Supreme Court's rationale for a narrow and restricted view of legislative privilege is to discourage and to cut off effectively direct communications between legislators and their constituents, or legislators and the public generally. By narrowing the scope of the legislative privilege, by placing it on a geographical or physical place basis, the U.S. Supreme Court left no room within the ambit of a purely "legislative" act for the legislator who attempts in one way or another to "inform" his constituents or the general public outside of the halls of Congress or the Committee rooms. Such activity as, for example, meeting with constituents to discuss legislation, preparing and issuing new letters, delivering speeches or statements outside of Congress, appearing on national television or radio, or even answering the mail from back home, is not within the scope of legislative immunity available to be claimed by the legislators since, in the Court's view, it is "political" not "legislative" in nature. The obvious inference to be drawn from the Court's discussion of these aspects of the so-called "informing function" is that they are merely self-serving, politically ingratiating activities which are in no way related to the pure legislative process. And yet, if a legislator cannot meet with constituents, with lobbyists, with representatives of all manner of interest groups, to discuss legislation and to get the benefit of their points of view—and to gather essential legislative data and information, with legislative immunity, can he effectively legislate? Can he effectively represent his constituents?

If a legislator cannot seek to mold and shape—and to lead—public opinion by issuing news letters, or delivering speeches or statements outside of Congress, all with legislative immunity, can he effectively perform his purely legislative duties? If a legislator can no longer appear and freely speak his mind about matters of public policy on national television or radio with legislative immunity, if he cannot freely and fearlessly express his opinions by answering his mail with legislative immunity, what can truly be said of the purported independence of the legislature under our system of separation of powers except that it has become a sham and a mockery? And yet, this is precisely the state of affairs contemplated and produced by the hopelessly restrictive interpretation of the scope of legislative privilege set forth by the Court in *Brewster* and *Gravel*.

The failure of the U.S. Supreme Court in *Brewster* and *Gravel* to define legislative activity in terms consonant with the realities and complexities of the modern legislative process, and its concomitant unwillingness to encompass within the protection of the constitutional privilege for speech or debate a wide spectrum of activities usually and customarily performed by legislators and their employees, particularly those activities usually associated with the "mediating" or "intervening" function, or with the "informing" function, has resulted in the present state of affairs where the privilege sought to be conferred by article I, section 6 of the U.S. Constitution has been rendered virtually worthless. As a direct result of the *Brewster* and *Gravel* decisions, much, if not most, of the activities generally carried out by legislators have been placed beyond the protective reach of the legislative privilege, thus exposing legislators to the constant threat of being called upon to answer elsewhere before grand juries or in the courts of this land for such activities. As Justice Frankfurter once observed, "We must not expect uncommon courage even from our legislators." It would be uncommon courage indeed for legislators to be totally unconcerned and uninhibited in their activities by the clear thrust of the Court's restrictive holdings and legal rationale in *Brewster* and *Gravel*. These decisions have clearly undermined the vitality of the separation of powers principle by introducing for the first time into legislative behavior the novel and dangerous doctrine that only purely "legislative" activities—and not so-called "political" activities—are entitled to constitutional protection.

If there is any truth and validity to the disastrous state of affairs we have been describing which have been produced by the *Brewster* and *Gravel* decisions, what, if anything, can be done? Perhaps the U.S. Supreme Court itself upon sober reflection will see the unfortunate tendencies, implications, and results of its

present position—particularly the unreality, unworkability, and uselessness of the legislative-political dichotomy it has sought to establish. Certainly the Court has changed its mind many times in the past, particularly when further scholarly and legal analysis has demonstrated the dangerous potentials inherent in the further utilization and unfolding of ill-considered doctrinal dogma. And, in fairness to the Court, the few decisive cases which we have had authoritatively interpreting the speech or debate privilege prior to *Brewster* and *Gravel* from *Coffin v. Coffin*, 4 Mass. 1 (1808), through *Kilbourn v. Thompson*, 103 U.S. 163 (1880), to *Tenney v. Brandhove*, 341 U.S. 367 (1951), and *United States v. Johnson*, 383 U.S. 169 (1966), left many important questions largely unanswered and contained within themselves the seeds of the narrow and restrictive construction which were to reach their full flowering in *Brewster* and *Gravel*. In a real sense, the speech or debate clause never had the firm constitutional underpinnings that it once seemed to have, nor did the *Johnson* case quite deliver all that it at first seemed—at least to some of us—to promise. The *Brewster* and *Gravel* decisions, in addition to manifesting a new departure, demonstrated the constitutional fragility of the speech or debate clause in our appellate decisions.

But it is not enough for the Congress of the United States to wait in hopeful expectation for the U.S. Supreme Court to change its mind on the nature and scope of legislative immunity. I believe that there are courses of action available to the Congress in reasserting and reclaiming its historic legislative privilege—and that the Congress should seriously consider adopting some at least of these possible courses of action.

First, I should like to see the Congress of the United States spell out a concurrent resolution on legislative privilege with some degree of care, comprehensiveness, and precision. Such a resolution should specifically set forth, inter alia, those acts embraced by the “mediating” or “intervening” function, and the “informing” function. Moreover, the Congress should make it clear to all its members that any activities deemed to constitute abuses of legislative privilege in these areas of activities shall be dealt with by the Congress itself and that appropriate procedures be established for policing and disciplining members who abuse their legislative privilege.

While such a concurrent resolution on legislative privilege obviously would not be necessarily conclusive and ultimately determinative of future issues likely to arise, it would as an authoritative statement by one of the three coordinate and coequal branches of Government regarding its view of its privileges provide individual members seeking to invoke the claim of the privilege in the future a stronger basis than presently exists for urging their claim upon the executive and judiciary. It might also immeasurably assist in bringing about a more realistic appraisal of its present unfortunate posture on this issue by the United States Supreme Court.

Secondly, I should like to see the U.S. Congress rewrite existing general bribery and conflict-of-interest legislation to eliminate its applicability to members of Congress. In the *Johnson* case, the Court specifically left unanswered the question of whether Congress could delegate to others—the executive and the judiciary—its power to try, to punish, to discipline its own members by means of a narrowly drawn statutory exercise of its legislative power to regulate the conduct of its members. In the *Brewster* case, the Court once again made it clear that the constitutionality of an inquiry that probes into legislative acts or the motivation for such acts where Congress has specifically delegated away to the executive or the judiciary such power on the basis of a narrowly drawn statute is still an open constitutional question. And in the *Brewster* case, the Court made it clear that Congress is free, if it wishes, to exempt its members from the ambit of Federal bribery law. The political wisdom or popular acceptability of exempting Congressmen from the applicability of existing bribery, conflict-of-interest, and possible other general criminal statutes is, of course, open to considerable controversy. Such action would undoubtedly be utilized by Congressional critics—or critics of individual Congressmen who supported such exemptions—as smacking of special privilege or preferred treatment. Undoubtedly, it would fan the flames of suspicion that Congressmen regard themselves as above the laws they make for general application to all of their fellow citizens. And, undoubtedly, there are those who would feel that the corrupt or the bribed or the improperly influenced Congressman would escape all punishment. But, clearly, such need not inevitably be the case. By exempting Congressmen from such statutes, Congress would be assuming sole and exclusive responsibility for dealing directly with its erring members. Congress would in time come to be recog-

nized as the exclusive forum for the trial and punishment of its wayward members. And Congress would be compelled to develop resources, techniques, and procedures for the orderly, efficient, and just trial and punishment of offending members.

I have argued in principle for the adoption of a broad, liberal, absolutist conception of legislative privilege and immunity as fundamental to the ultimate preservation and vitality of our governmental system of separation of powers. In modern society, only a strong, uninhibited legislature, fully secure and protected in its exercise of its powers and its discharge of its responsibilities, can hope to redress the centralizing imbalance of ever-increasing executive power.

In arguing for absolute immunity—immunity in its most pristine, unyielding, and unwavering form—I am not unmindful of the fact that many people who disagree with the decisions of the U.S. Supreme Court in *Brewster* and *Gravel* are not prepared to go as far as I am in reasserting legislative privilege to include, for example, a Congressman's activity in "mediating" or "intervening" with executive officials, departments, and agencies. And perhaps there are those who feel that it is too late in the day to bring such activity within the ambit of legislative privilege. I do not agree. In any event, certain matters are clear. Legislative privilege is no longer a matter of mere academic, or intellectual, interest. The very future of constitutional representative democracy is likely to hinge upon the ability of Congress to take appropriate action to reclaim its lost privileges and immunities. And hand in hand with the reassertion of absolute privilege must come a greater legislative sensitivity to the need for developing effective procedures and practices for punishing and otherwise disciplining legislators, who in one way or another violate their public trust.

I have tried to suggest some measures which may assist the Congress in its efforts to overcome the disastrous impact of the *Brewster* and *Gravel* decisions. Undoubtedly, there are others which may be equally—or perhaps even more—effective.

It is my earnest hope that this committee, upon the conclusion of its hearings and deliberations, may be in a position to recommend constructive action. No problem confronting the Congress today is more worthy of your time, energy, and best efforts than this struggle to preserve the strength of our system of separation of powers through the establishment of a strong and effective modern doctrine of legislative privilege.

Mr. CELLA. It is my considered judgment that these hearings which are taking place and this record which is being built by this committee, are among the most important hearings going on in the Congress at the present time. Certainly, you need just look around today to realize that the drama and the excitement that surrounds certain other hearings in other parts of this city at the present time, are not present here today. We have had the whole gamut of executive—congressional relations and the efforts of the Congress and on many fronts to reassert its authority.

I think your efforts are far more significant and I wholeheartedly approve. Nonetheless, in these other areas, I think to place them in perspective, it seems fair to say, that many of them are really the kind of qualitative, continuing skirmishes that go in any system of separation of powers. I don't mean to minimize or downgrade the significance of other hearings. It does seem to me that, in a sense, regardless of what the ultimate outcome is in these areas, such as executive privilege, as important as that is, I think Senator Gravel has led the fight in this area and others in Congress recognize its importance, and certainly the legislation which he has offered this morning to deal with among other problems, the problem of executive privilege, this is obviously a very important area of concern to the Congress and to the American people.

In the final analysis, however, regardless of the outcome, of this matter, if it gets before the court and the courts for the first time begin

to define the parameters of the doctrine of executive privilege, if in fact such doctrine exists, or if on the issue of impoundment of funds, the accountability of the Congress to have its money, the moneys it appropriates, spent for executive programs, regardless even of the outcome of that fight, or of the question of the ability of the Congress to compel testimony of the executive branch officials, seeking to invoke the doctrine of executive privilege, all these many skirmishes, including the whole problem of Presidential conduct of foreign policy the warmaking power, which are taking place and which are the items which the popular press and the American people unfortunately, or fortunately in a sense, unfortunately from the point of view of the purposes of this hearing, are tending to focus their attention upon. I think, in many ways these are all continuing manifestations of the basic problems of the operations of the system of separation of powers. As important as they are, regardless of their outcome, whether the Congress wins or the President wins, whether the Congress has more power or less power, and the system will in one sense continue to function.

Even though we may muddle along, and perhaps not function in the way in which some of us would like to see the system function. But on this issue, essentially the issue of legislative immunity from prosecution for speech or debate, there is no single more important issue in the Congress in my judgment because this represents not the quantitative skirmishes that go on continually in the doctrine of separation of powers, this built-in controversy and struggle which the Founding Fathers worked into the very framework of our Constitution. This really represents for the first time in the *Brewster* and *Gravel* decisions in my judgment a fundamental undermining in a qualitative sense of the ability of the Congress of the United States to carry out its constitutionally assigned functions.

So I would like to make this distinction even though, and I assume this must be somewhat frustrating to those of you on the committee who recognize it or obviously you wouldn't be holding these hearings, the importance of these issues and I think those who have appeared before you, Senator Fulbright, Justice Goldberg, Senator Ervin, Senator Gravel, obviously recognize the tremendous importance. I am not at all sure as yet that many of your colleagues in the Congress have awakened to the importance of this issue for them in the future conduct of their work. Consequently, I don't think the American press or the American people are sufficiently aware of what the impact of those judicial decisions in *Brewster* and *Gravel* were in terms of the continuing functions of a system of separation of powers and a representative democratic system.

So I commend you very highly for these hearings. I commend you for the record which you are building here. I hope it shall be possible through your efforts and the work of this committee to get these issues before the American people and to begin to alert not only the American people and the press, but to attract the attention of your colleagues in the Congress who, I am sorry to say, I don't think they are as well aware of the significance of this matter as they ought to be.

Now, without reviewing, and in my article, the law review article which I suggested was published prior to the *Brewster* and *Gravel* decisions, I have reviewed at length, I think, the history and some of the earlier decisions prior to the *Johnson* case involving the doctrine of legislative privilege. I don't think it is essential to take the time of the

committee to review the history in this area which I think is quite clear and which is there in the record.

I would like to focus, if I might, on what I regard as the crucial distinction established by the Court and to take some time attacking this distinction. I think, in the final analysis, that it is not only arbitrary but unreasonable, unrealistic, and unworkable. It is the stratagem, the judicial stratagem, by which the Court circumscribed and I think in disastrous ways restricted the privileges of this Congress.

And for that reason, I would like to call the attention of the committee to the way in which this was done for a few moments.

The Court, of course, established for the first time in our jurisprudence a distinction between legislative and political acts. The legislative act, the Court said in the *Brewster* case, legislative acts, of course, in the judgment of the Court are fully protected, or so the Court says. This is not quite as true as the Court would lead you to believe because as we will see, it is even possible under some circumstances for inquiry to be made elsewhere, in the judicial or executive branch, in grand juries, into matters involving even votes or speeches of members of the legislature in the House so that in a sense, when you come to this a little bit later, even the protected area, so called, is not as protected as the Court would have us believe.

But, in general terms for the moment, legislative acts are those acts which are so insignificant in thinking, in the judgment of the Court to deserve the protection of the privilege against prosecution for speech or debate under article I, section 6 of the Constitution. Nonlegislative acts, or political acts, are not entitled to the protection, so obviously you have a crucial distinction which deserves to be examined. In the *Brewster* case the Court went on to define this distinction:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activity protected by the speech and debate clause. These include a wide range of legislative errands performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called newsletters to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They have been performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections.

Although these are entirely legitimate activities, they are political in nature, rather than legislative, in the sense that that material has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the speech or debate clause.

That is the Court's first dealing with the distinction established in the *Brewster* case between legislative and political decisions, political acts of the Congress.

Now, in the second case, *Gravel* case, the Court went on to develop further this distinction.

The Court says that the mere fact that because Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.

Members of Congress are constantly in touch with the executive branch of the Government and with administrative agencies. They may cajole and exhort with respect to the administration of the Federal statute but such conduct though generally done is not protected legislative activity.

And finally, the Court went on in the *Gravel* case—

legislative acts are not all encompassing. The heart of the clause is speech or debate in either House. And insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Now, I have suggested that this distinction is really crucial to an understanding of the *Brewster* and *Gravel* cases and to the present status of the doctrine of legislative immunity as interpreted by the U.S. Supreme Court, I suggest very strongly that this is an unreasonable and unworkable, an arbitrary, and unrealistic definition. Passing over the arrogance of the Court in attempting to define with precision the nature of legislative activity, which is not something to be passed over lightly by any Member of the Congress, the fact remains this distinction is arbitrary and unreasonable, and cannot be made to work. I think the essence of the difficulty with the distinction, it seems to me, is precisely this. That every act performed by a legislator is in a fundamental and profound sense a political act, if by political act we mean the efforts of the legislator to secure, to hold, and to exercise political power.

Now, if this is the case, then when a legislator makes a speech on the floor of the House which presumably is a protected matter, is there not a political consequence to the speech which he makes? Obviously there is. Is he not sometimes making that speech not only to contribute necessarily to the debate and the unfounding of the issue before the Congress but also from the point of view of attempting to inform his constituents as to his own position, attempting to place his strength as a member of the legislature behind certain propositions and proposals which are being advanced in the legislative process, which he thinks in addition to whatever contribution they may make to the process itself, also have a political impact in terms of his position vis-a-vis his constituents.

I think this is quite clear, and I think that the real weakness of the definition readily becomes more apparent when we stop to ponder the fact that—you cannot establish with any degree of ease, you cannot utilize this definition the Court has established, and if you try to play around with it and apply it to situations you begin to see how quickly it breaks down.

For example, suppose a member of the legislature carefully prepares with his staff in the normal, usual way a statement of his position on a major issue of public importance before the Congress. All right. Under this definition, the acts of preparation first of all are no longer protected. It is possible that he might be called and might be held to answer in another forum, before a grand jury under appropriate circumstances, for the preparation of the act, the meeting with his staff, the meeting with the people as a whole to formulate the ideas, to get the information needed to make that speech.

But even assuming, even eliminating the problem of preparation, now the Congressman has a speech which he has carefully prepared and drafted.

Now, is that a political speech, is it a legislative speech, is it a political or a legislative act? What determines this?

Apparently, according to the Court, the only thing that now determines whether this is a legislative or political act on the part of the Congressman, is where the Congressman chooses to make the speech or issue the statement.

If he does it in committee, then it is a legislative act. If he goes before a committee, makes his statement or issues it in some manner in the confines of the committee hearing room, it is a legislative act. If he makes it on the floor of the legislature, it is a legislative act entitled to the fullest protection according to the Court under its distinction.

If, instead, he decides that there are important or appropriate forums elsewhere, or if he makes a determination to give this speech or statement elsewhere, other than within the geographic confines of the Congress, that same speech unaltered in any material way in its contents now becomes according to the Court, a political act, not entitled to be protected.

Now, I find this a very difficult distinction an unworkable and unrealistic distinction to make.

I think that among its other troublesome aspects, is the fact that the Court indicates a profound lack of understanding and sensitivity to the nature of the modern legislative processes. They don't really understand, I suggest, precisely what it is that a Congressman does even though there is language in the decision in which they would attempt to convey the impression that they recognize that there are other kinds of activities than those which they deemed worthy of protection which are normally required of Congressmen. They then say very quickly, however, that the reason a man does these acts is merely to ingratiate himself politically or because his constituents have come to expect this from him. These are the only motivations.

This becomes to my way of thinking a totally unworkable distinction and one which if the Court were to attempt in the future to try to spell it out, to apply it to concrete situations as they arise, I suggest that the unworkability, the unrealism of the distinction will become increasingly apparent to all. You cannot isolate it, it seems to me, in a representative democratic system where Congressmen are elected where they are answerable to the public every 2 years, or every 6 years, for they have to go back and give of an account their stewardship to be reelected, you cannot arbitrarily say that the actions of a Congressman, certain of these, are purely legislative and others are purely political, and try to make that distinction, and of course the reason for doing it is quite obvious. This is the judicial stratagem, if they can make this distinction stick, whereby you have a very effective legal stratagem for narrowing and circumscribing the scope of congressional power.

If you want to see this clearly demonstrated it seems to me just ask yourself the question: "Prior to Gravel and Brewster, prior to the enunciation of this distinction, had not the scope of the congressional immunity been very broadly construed?" I recognize that within those earlier decisions, in all fairness to the Court, there were the seeds of a narrowing, restrictive doctrine, although most of us, I and others included, I think generally believed that the language in those decisions which was calling for a broad liberal construction of speech and debate to include those activities normally performed by Congressmen in the discharge of their duties, we thought this was the real thrust of

these earlier decisions. As was demonstrated masterfully in one way, we have to credit the decision of Justice Burger, we have to view that decision as being masterful in the sense that they were able to pick up those narrow and restrictive elements in the earlier decision and weave them together thus permitting them to arrive at the conclusion, a narrow and restrictive immunity, and to suggest this was always there.

I think that the earlier decisions had a lot of unanswered questions, and we have a lot of unanswered questions even today. The strategem, the judicial statagem, of using this political-legislative distinction, and attaching to it the consequences of whether or not immunity would attach, I think are quite clear, and you ask yourself the questions: "How much activity normally, customarily performed by a Congressman prior to Brewster and Gravel was generally believed to be covered by the privilege, by the scope of legislative immunity, and how much after Brewster and Gravel are the normal, functioning daily activities of a Congressman now covered? What uncertainties now exist as to whether or not they are even covered?" I think you can thus begin to see the magnitude of the narrowing of the scope of the privilege effectuated by the Court by the utilization of this judicial stratagem and judicial distinction.

I would go so far as to say now, much, if not most of the activity formerly believed to be protected is now no longer protected, and there are serious questions and doubts even as to areas which appear to be protected within the framework, within the terms of the Court's own decision, of a purely legislative act. There is even considerable doubt as to how far these are protected. I think Senator Ervin and others have pointed out quite effectively that it is still possible under the terms of the *Brewster* and *Gravel* decisions and the distinctions established by the Court, a distinct possibility for the executive or the judiciary to inquire into the motives of a Congressman in making a speech or in casting a vote. That is very little protected any more. They cannot do it if they are inquiring into motives as they relate to a legislative act but they can do it if there is a suggestion of bribery, for example. The performance of the act, according to the Court, is not a subject for inquiry. But the agreement to enter into the bribe, that can be inquired into. And the consequences are such that if there is a suspicion of illegal criminal activity, it is now possible, it seems to me, and we will have to await further unfolding of these decisions, a logical analysis seems to suggest it is now possible even for that speech or that vote to be inquired into tangentially at least by the executive or by grand juries or by the judiciary. I think that these distinctions, this distinction, is unreasonable, unrealistic, and unworkable.

I think I understand, as I have tried to suggest, the reason for the Court's promulgating, enunciating this distinction.

And one other aspect I think that comes out of the effort of the Court to develop this distinction is that you also may ask yourself very realistically: "What is the conception of the legislative process that the Court seems to be operating under in setting forth these distinctions?" Or perhaps there is another way of formulating it: "What is the Court's conception of the good legislator?" The good legislator presumably is a legislator who devotes his attention to the purely legislative function. That is to say, they paint the image of a legislator who

comes to his committee hearings, sits there, participates, listens to the arguments that are being advanced, goes to the floor, sits there on the floor when he is not participating himself, listens to the arguments advanced, makes up his mind as to how he is going to vote, and ultimately casts his vote.

This kind of geographic, physical place conception, this moving from the committee room to the floor and back again, and this is really all that they feel worthy of being protected, even in their own terms.

Now, what does that mean? First of all, all of the casework carried on by Congressmen, the so-called mediating function of the Congressman, or intervening function, which constitutes so vital a part of every congressional office, the ombudsman function of the Congress, if you will, and every Congressman is his district's own ombudsman, as you know, that function is legitimate to be sure, but not purely legislative activity, says the Court, and therefore not entitled to be protected.

I can't be too critical of the Court in Brewster and Gravel on this issue of the mediating function because this has earlier antecedents. The courts apparently long ago rejected the notion that this mediating function, this intervening in making appointments or dealing with administrative agencies or the executive branch officials on behalf of constituents, trying to reconcile, work out constituent problems, in this respect, the courts long ago reached a conclusion apparently that this was not a legitimate part or a proper part of the legislative function, and therefore not entitled to be protected.

I never have agreed from a personal point of view—and here I take a different attitude even from some of the dissenters in Gravel and Brewster, and Justice Harlan in his magnificent exposition of the *Johnson* case. They would not go as far as I am prepared to go in this area.

I would like to see, if the Congress is talking about reasserting its powers and prerogatives, I would like to see the Congress attempt to cloak with legislative immunity this kind of activity which constitutes so important, so quantitatively important, a part of every Congressman's working day. That is a personal predilection which derives out of my basic position that I personally favor conceptually, and I think there are ways in which the Congress can act to get there, I personally favor, the broadest absolute immunity of Congressmen from persecution.

I want to see Congress itself deal with its own erring Members, with the erring Members and malfactors within the body itself. I want to see absolute immunity, and I carry this through even to bribery situations, I would carry it to the conflict of interest situations. My position, I recognize, is a logical consistent one.

I call for an absolute immunity. I have to be consistent and face those statutes which already exist which permit Congressmen to be tried in courts of law under general criminal statutes.

I would like to see the Congress exempt from such activity, from such statutes, particularly bribery and conflict of interest. Members of Congress. But that doesn't mean that I want to see Congressmen who violate their public faith in any way go unpunished. I think the Congress itself must develop a sensitivity and the procedure necessary for dealing with its own problems and with its Members who violate their public trust.

Now, apart from that mediating function which I talked about, which is perhaps my own pet hobby horse, in a sense with reference to this, and I frankly say that even many of the supporters of legislative privilege are not prepared to go this far. The fact of the matter is that most supporters of legislative privilege, certainly Senator Gravel, Senator Ervin in their bills have indicated that one thing which is left out completely of their definition, or of the definition established of legislative and political acts by the U.S. Supreme Court in *Brewster* and *Gravel* is the so-called informing function of the Congress. There is no room if all that is protected is what transpires in committees and what transpires on the floor, there is then no room if this is the geographic interpretation of the speech or debate clause which the court is now urging upon us, there is no room in the definition for the informing function for the Congressman to go back to his constituents or meet with constituents outside of the committee room or outside of the Halls of Congress itself, to exchange and communicate and pass information back and forth and apprise the constituency of his position on pressing issues of public policy—

Senator GRAVEL. Could I interrupt you? I find that most significant, and I want to congratulate you on that.

What other vehicle would exist for the people themselves to partake in the exercise of power and self-government if this were not available? If they don't know, if the Congressman is not informed, so they can react, counsel, advise, what other vehicles would there exist for people to work at self-government?

Mr. CELLA. I don't see any other vehicle. I think you are absolutely right.

It seems to me the informing function of the Congress as President Wilson said in his magnificent study of congressional government, "It is to be preferred even to its legislative function." I might say on this informing function, I think it is important to get one other factor into the record. Oftentimes you will hear about the informing function and you will see the Wilson quote. And be very careful in analyzing the decisions of the court in this regard. In my judgment, the U.S. Supreme Court has never sanctioned the informing function in its broader sense. It has never sanctioned the informing function as conceived by Wilson and some of the earlier political writers, Walter Bagehot, Lord Bryce in the American Commonwealth, they were very much concerned about the Congress, the representative assembly, the legislature being the chief educational force in public life. This is really where the public is going to learn about Government, through the operations and the activities of the Congress, the representative assembly. And Walter Bagehot in his political philosophy, Lloyd Bryce, Woodrow Wilson in his classic study of Congressional Government, all talked about the informing function in the broadest possible terms. Wilson, for example, said "Quite as important as legislation is vigilant oversight of the administration, and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns," note carefully *all national concerns*, "suffused in the broad daylight of discussion," and then he went on, "the informing function should be preferred even to its legislative function."

Chairman METCALF. May I interrupt you there, Professor Cella, this committee for several years has been concerned with the Congressional Record and having activities of the Congress on the floor actually reflected in official reports of the Congress.

Now, there are 535 of us. There are very strict rules, especially in the House of Representatives, as to how you can even get the floor under a resolution brought in by the Rules Committee. Maybe there is only 2 hours of debate. Then the first time you even get a chance to debate is under a pro forma 5-minute rule.

Now, how are we as Members of Congress, under those very strict rules, going to inform our constituents as to how we feel on legislation, if the only thing that we have to protect us is what actually goes on in this committee room or actually on the floor of the body where we have rather circumscribed our activities? There just isn't enough time in the day for all of us to make the necessary speeches, so we have resorted to newsletters; we have resorted to statements to the press; and we have resorted to radio interviews or TV interviews at home. All of these are necessary to carry out the informing function that we owe to our constituents.

Now, don't you think that it is important to tell our constituents out in Alaska or in Texas or in Montana how their Senators and Congressmen feel, by such means? Or must they read in the Congressional Record how a chairman of a committee feels without ever finding out how their own representatives have acted?

Mr. CELLA. Senator, I couldn't agree with you more. That is one of the most troublesome aspects of the logic and rationale of the Court's distinction, the unwillingness of the Court to protect precisely this kind of activity.

I will go one step further. I don't think this is merely a passive process by which the Congress or individual Congressmen attempt to merely inform their constituents as to how they feel about matters of public policy. As important as that is, it seems to me that the Congressmen, their representative has even a more important function and that is to participate in the moulding and shaping of the formation of public opinion, not merely to sit here as a weather vane reflecting the views as you see them of your constituents, based on certain information about your positions. You don't sit here on a day-to-day basis trying to decide how the people back home feel. That isn't all a Congressman does or ought to do. It seems to me you have an affirmative obligation to try to educate the people. After all, Members of Congress by virtue of the jobs they do day in and day out acquire vast quantities of information, knowledge and understanding about the problems of Government. You have got a duty to share that with your constituents and share in the sense of helping your constituents in the moulding and formulation of their attitudes so that they don't go astray.

This is not an easy thing to do many times. Sometimes this involves a Congressman taking positions which are not particularly popular which he knows based on an objective knowledge and understanding and information he has acquired in his daily work, he knows that the best interest of his district or the best interests of the country require him to take these positions. And that is always very difficult and

there are great political hazards obviously to get out in front of the constituency and take these positions, as Senator Gravel and others have done on occasion, and try to lead people to come around to your point of view, and many times they come around eventually. Many times they don't come around in time for the next election and a Congressman finds that his efforts to perform his function and live up to the highest ideals of representative democracy, educating moulding, helping to shape, inform public opinion, often times are not appreciated and are not rewarded by a constituency. Yet I think this kind of activity is essential.

The decisions of the court in these cases will not give the protection to Congressmen engaged in this very important activity and for these reasons I find again I am greatly disturbed by the attempt to establish these distinctions and to apply them.

Senator GRAVEL. Could I just insert an example that underscores this in a very tragic manner. I am not sure that many of the Members have information about this.

When the Pentagon papers were sent to the Congress, they were sent as top secret classified. They were given to the President pro tempore, the Speaker, and they were placed in a room under guard. Members—and this is where the hoax takes place—were invited to come and read the Pentagon papers. In point of fact, we have 535 Members of the Congress. Less than 15 went to those rooms. Now, they could not take notes on what was in the Pentagon papers. A Senator or Congressman would sit there like a child in kindergarten and some other person was there, an employee of the Congress, who rapped their hands with a ruler if they took out a pad and started scribbling something from the Pentagon papers, which are now in all the libraries.

So what you had take place was through the device and complicity of the Congress itself. There was no way a Member could inform himself. No Member of the 15 that were there, spent more than 2 hours.

So there is no way that—it would take a week to really acquire it. Staff was not permitted, so the hoax was that the Congress was being informed. The only way to truly inform the Congress was to give it to the people, because the Members of the Congress themselves did not have the time to do it. They needed to give it to the people, people like yourself who could digest the information and hammer it back to us. That could not have taken place under the system that existed at that point.

I just cite that as an example of how this takes a different thrust.

Mr. CELLA. It seems to me I couldn't agree with you more. It seems to me it really—to stop to think about what the Court did in these decisions, in terms of its understanding, or lack of understanding on the part of the Court as to the nature or the complexity of the modern legislative process, it is rather frightening. You know and every Member of the Congress knows you would not do your work as a Congressman if all you were doing is shuffling back and forth from committee to the floor, and there is almost an implication that this is really what you ought to be doing if you are not participating in the sense of making a contribution, either speaking or questioning witnesses in committee, then you ought at least to sit there; that virtually is all Congressmen do from the point of view of analyzing the conception of the Court, that Congressmen ought to sit there and hear every-

thing, and that is all Congressmen obviously ought to do. There are other things to be done, other things that have to be done in order to carry out your representative function, and yet the Court would not in the terms and framework of its own definition accord to the Congressman doing these other things, any measure of protection under the speech or debate clause.

Now, let me make a few final observations. In this area, I would be very happy to answer any other questions. Given, if there is any validity to the positions I have tried to urge upon this committee and that others have urged in terms of the frightening impact of the *Brewster* and *Gravel* decisions, in terms of taking out from under the umbrella of legislative immunity all kinds of activities, most people, most informed students, really felt were there prior to *Brewster* and *Gravel*, even though as I suggested there is some confusion, some contradiction, some difficulty in the earlier decisions, if there is any validity to this, what now remains to be done? What can the Congress do if anything?

You are going to hear, I understand, and I have had an opportunity to see the testimony of the administration on this score, and it is going to be urged upon this committee that perhaps the situation is not quite as bad as it seems. These decisions can be interpreted, you will be told, in ways in which perhaps some of us are unduly alarmist in suggesting that the effectiveness of Congress has been undermined by the impact of these judicial decisions. And it is also going to be urged upon you that in any event, even if you think that this is the case, that Congress' position and the separation of power system have been qualitatively undermined, there isn't anything you can do about it. This is going to require a constitutional amendment to change and if you are prepared to go that route and spend the 7 years or more to get a constitutional amendment adopted, I assume the administration's position is, "Go ahead and do it."

Now, I think that Justice Goldberg it seems to me with all his brilliance and distinction on the bench offered this committee a cogent repudiation of that position in his testimony yesterday. And I don't think there is any doubt there are many things which the Congress can do in this area if it chooses to do so to attempt to reassert the privileges and prerogatives we think they ought to have and we thought they did have prior to *Gravel* and *Brewster*. I have tried to discuss this in my statement. This is an area where obviously the greatest deliberation must be given, and this is not an area in which this committee or the Congress necessarily should move lightly. All alternatives ought to be explored before final action is taken.

I suggest perhaps we need additional studies—unfortunately there are so many areas that need additional study, before we can intelligently and effectively move. I don't have too many answers in this area. I wish I did. I am sure many others do not have answers to meet these problems.

It seems to me that the legislation, for example, suggested by Senator Ervin and Senator Gravel, at least with reference to these aspects of legislative immunity, is certainly worthy of consideration.

I don't see how the administration can maintain, for example, that it is not within the constitutional powers of the Congress to with-

hold jurisdiction from grand juries and the Federal courts in matters involving appearances of Congressmen or their aides.

I think quite clearly that the Congress following the lead in the Ervin and Gravel bills in this area, could assert its power to withdraw jurisdiction from the courts and grand juries in this area. And I think it ought to do so.

In addition, I think that one way or the other Congress must devise some way of dealing with getting a more realistic definition of legislative activity. If we are not satisfied with the definition of the Court, and I have tried to indicate my great dissatisfaction with much of it, it seems to me there are ways in which the Congress itself can act in this area.

I tried to suggest in my statement that short of legislation, for example, which ultimately would involve, of course, if you pass a bill, ultimately it is going to the President if you pass a bill to veto it if he wishes. Even short of legislation, Senator Ervin has proposed a change in the rules which could be done without the necessity for Presidential approbation. In addition, there might be some thought given to the suggestion I made in my prepared statement of perhaps having a concurrent resolution, maybe even a separate resolution from each branch setting forth the understanding of the legislature, the understanding of the Congress, as to what the scope of executive activity properly ought to be. You might say, "Well, that is really an exercise in futility." Well, how are we going to persuade the Court ultimately that this is the case?

Well, I don't know. I am not optimistic. I would like to believe that the Court upon sober reflection and upon critical analysis by scholars and by Congressmen and others would begin to realize the enormity of what has been done and would begin to back off. I am not at all sanguine about the prospect, within that area. It seems to me in the case of *Doe v. McMillan* which the Court has currently before it, which arguments were heard in December, the case involving civil immunity. It seems to me the Court may well be—the Court granted certiorari in this area, the Court is beginning to move in on this area of civil immunity and to narrow correspondingly the scope of legislative privilege. I am not sanguine as to the prospects of the Court seeing the error of its ways, as I see it, and adopting a more realistic position.

In any event, where the Congress itself by means of a resolution either separately in each branch or concurrently defines or attempts to define the scope of legislative activity which in the judgment of the Members of Congress, is the proper scope, the legitimate scope of legislative inquiry, legislative activity entitled to be protected by the speech or debate clause, then at least an individual Member who might in the future run afoul of the judicial interpretation of the speech or debate clause would at least be able to point to an authoritative statement from the body itself as to their scope, their understanding of the scope of legislative activity. It is not conclusive by any means and it is perhaps an exercise in futility. At least they would be helping the Congress along, by means short of legislation, to defining in more realistic and comprehensive terms the nature of the legislative process as they view it.

Certainly it could do no harm and I suspect that conceivably it might well be a step which would lead hopefully, unless the position of the Court is so hopelessly intransigent in this area, might well lead

to the reevaluation and rethinking of the Court's position. I think these are the things which can be done statutorily. There are also things which can be done by means of rules changes, by means of resolutions, House and Senate resolutions, which I think can have a vital and important impact in attempting on the part of the Congress to reassert privileges which they thought they always had and which they ought to have in view of the doctrine of separation of powers.

It seems to me further, I understand that there are those who are somewhat troubled from time to time by the—let's put in the terms of the strict constructionists who say, "Well, show me in the Constitution where speech or debate can be so broadly and liberally construed as to encompass all these activities which you and others have been talking about." Well, trying to answer this question, you must realize—let me pose some other questions to the strict constructionist: "Show me in the Constitution where the Constitution specifically authorized the Congress, or the Senate or the House, to hold legislative investigations?" Nothing in the Constitution says the legislature may hold legislative investigations.

There is the broad grant of legislative power. As a necessary corollary of the grant of broad legislative power, the courts have construed as incidental to the exercise of legislative power the right of a legislature to investigate, to get at the facts needed to legislate.

Again, I say to my friends, the strict constructionists, "show me where in the Constitution of the United States, Congress derives the power to punish for contempt?" And again the Constitution is silent, and yet, by necessary implication, as part of the separation of powers and the necessity for protecting your own branch, and the integrity of your own process, the courts have sanctioned this. In addition, the courts have pointed to the historical experience not only in that grand exemplar of legislative institutions, the House of Commons, but also in the early colonial assemblies in this country. Our Founding Fathers were really so confident that when they talked about legislative power, that implicit in that power, in that grant of legislative power to the Congress in broad generic terms, implicit in that grant of power was the right to investigate, to conduct legislative inquiries, and the right to punish for contempt that they didn't feel the necessity, so confident were they that legislative power encompassed all these things, they didn't feel the necessity to spell it out.

On the contempt situation, you find, for example, I think in the first 11 State constitutions. I think there are only three or four where the Founding Fathers in those States saw fit to put in their constitutions specific provisions for contempt and Massachusetts happens to be one of those States. Most States didn't see the necessity. It was encompassed in the broad generic grant of legislative power.

Now, I think, too, regarding the strict constructionists, that one final argument ought to be called to their attention. The U.S. Supreme Court has held, for example, in the *Watkins* case back in 1957, that a witness before a congressional committee under appropriate circumstances has the right, the constitutional right, to invoke the provisions of the first amendment. Now, where, does one in strict constructionist terms, where is there in the first amendment, any such right conferred upon a witness? The first amendment merely says Congress shall pass no law abridging freedom of speech, et cetera. Congress shall pass no law. Is a legislative investigation a law? But in the *Watkins* decision,

the court analyzing this doctrine said, lawmaking involves committee hearings. We will permit the first amendment to be applied not only to laws enacted by the Congress, so a member of the public has the right not only to refuse to comply with a law on first amendment grounds, he may also invoke his first amendment rights with reference to the lawmaking process. But again in strict constructionist terms, you won't find that in the first amendment. I don't have the difficulty that the strict constructionists have with this problem of the ability to broaden the language of the speech or debate clause because I think even going beyond the words, you have to look at it, it seems to me, the historical purpose to be served.

It has been suggested, and I think quite rightly, that even if you didn't have the speech or debate clause, but you had a system of separation of power, it would be necessary to create something very much like the speech or debate privilege and in order to have a functioning separation of powers system. I think the historical purposes designed to be served by the doctrine of immunity of prosecution for speech or debate; namely, to prevent individual Congressmen from harassment by a hostile executive and an unfriendly judiciary, are of vital significance. It is his immunity, not necessarily that of the body, which has gotten the courts into discussions in the minority opinions, obviously, as to whether the Congress, could for example, pass a statute, a narrowly defined statute, delegating away to the judiciary, to the executive, the power to discipline a Member for various activities. It seems to me that were a Member to invoke the doctrine of immunity for prosecution for speech or debate, he would be entitled to the claim of that doctrine and that the Congress cannot by a statute waive the rights of the individual Member given to him by the provisions of article 1, section 6.

So for all of these reasons, I would argue and urge Congress not to be intimidated, not to be turned away for any reasons from the necessity for taking affirmative action in this area of reasserting legislative privilege, and I would certainly not be at all concerned, particularly in the light of Justice Goldberg's brilliant testimony yesterday afternoon, about the prospects that the Congress cannot act in this area except by means of constitutional amendment.

I think this is a totally fallacious argument. There are many things the Congress can do statutorily, by rules changes, and by the adoption of resolutions which can help in this area and to suggest, it seems to me that the only way to proceed is by constitutional amendment is to run far afield of the actual powers of the Congress in this area.

So I certainly want to thank the members of this committee for their great patience in hearing me today, and I would be delighted to try to answer any additional questions Senator Metcalf or the committee may have with reference to my statement or the problem in this area.

Chairman METCALF. I want to thank you, Professor Cella, for a brilliant exposition today.

I want to call attention to your law review article which was, as you say, published before the decisions of the Supreme Court in the *Brewster* and *Gravel* cases. It is a scholarly exposition of what we thought the law was under the Constitution prior to those cases.

I think that with your permission, it is an important part of the record, and I will include it in the record at the conclusion of your testimony.

Mr. CELLA. I would be deeply honored to have it so included.

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THE DOCTRINE OF LEGISLATIVE PRIVILEGE OF FREEDOM OF SPEECH AND DEBATE: ITS PAST, PRESENT AND FUTURE AS A BAR TO CRIMINAL PROSECUTIONS IN THE COURTS

ALEXANDER J. CELLA*

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I. INTRODUCTION: THE PROBLEM DEFINED

ON February 24, 1966, the United States Supreme Court in the case of *United States v. Johnson*,¹ delivered an historic decision involving the doctrine of legislative privilege or congressional immunity from criminal prosecution under article I, section 6 of the Constitution of the United States—the so-called speech and debate clause.² In a case of first impression, the Court was called upon to decide the specific issue of whether the congressional privilege de-

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¹ 383 U.S. 169 (1966). See also pre-trial opinion of district court, 215 F. Supp. 300 (D.N.D. 1963) and court of appeals, 337 F.2d 180 (4th Cir. 1964).

² The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place. (Emphasis supplied).

prived a federal court of jurisdiction to try a member of Congress on a criminal charge of accepting money to make a speech in the House of Representatives of which he is a member, in furtherance of a conspiracy to defraud the United States.

In its decision the Supreme Court held that prosecution of a member of Congress under a general criminal statute, dependent upon inquiry into his motivation in delivering a speech or participating in a debate, contravened the speech and debate clause and was not to be permitted. While the Supreme Court narrowly confined its holding only to such circumstances as those presented in the *Johnson* case, the underlying rationale and full implications of this decision have not as yet been sufficiently explored and critically examined by legal scholars.

The Supreme Court explicitly distinguished this class of cases involving the acceptance by a legislator of money for the delivering of a speech before the legislative body from two other general classes of cases involving the misbehavior of legislators, which it specifically left open for future decision on appropriate facts. Nonetheless, the significance of *Johnson* as an indication of the direction of the Court's thinking in this vital area of constitutional and criminal law cannot be underestimated. The decision is important not only for the absolute prohibition which it imposes against the criminal prosecution of members of Congress for at least one class of otherwise illegal acts, but also because of the far-reaching impact which it is certain to have in conferring immunity from criminal prosecution upon members of state legislatures throughout the United States for the same class of acts.³ And while the decision left many unresolved questions as to what other classes of otherwise illegal acts, if any, might be held to fall within the ambit of immunity from criminal prosecution, it did open up many extremely fertile areas for future judicial determination which criminal lawyers most assuredly will raise in the years ahead.

The long-range legal consequences of *Johnson* are likely to be of greater and more substantial impact in matters involving state legislators, particularly in such states⁴ as Massachusetts, Maryland and

³ See, 50 IOWA L. REV. 893, 895-96, n.13, for a listing of state constitutional provisions establishing the doctrine of legislative privilege.

⁴ See e.g., MASS. CONST. art. XXI (1780). "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."; MD. DECL. RTS. art. 10 (1867). "That freedom of speech and debates, or proceedings in the Legislature,

New Hampshire where the constitutional language of the doctrine of legislative privilege is more liberal in its phraseology, than the language of article I, section 6 of the Constitution of the United States.

In this article, the historical origins and development of the doctrine of legislative privilege, together with the underlying and emergent public policy considerations will be discussed at length. Prior American judicial decisions embodying specific applications of the doctrine of legislative privilege will then be considered. The landmark Massachusetts case of *Coffin v. Coffin*,⁵ its rationale and implications, will be fully explored. The *Johnson* case will then be thoroughly analyzed with particular reference to the major unanswered questions as to the scope and limits, if any, of the doctrine of legislative privilege in light of the realities of the proper functioning of a modern legislative system. And, finally, in view of the operation of the doctrine as a bar to criminal prosecution in the courts, the suitability and inherent difficulties of the legislature, as an alternative forum for the trial of its members, will be examined.

II. HISTORICAL ORIGINS AND DEVELOPMENT OF THE DOCTRINE OF LEGISLATIVE PRIVILEGE

The doctrine of legislative privilege had its historical antecedents in the long, slow struggle of Parliament and the Crown to establish and assert their respective powers in England.⁶ Although the origins of Parliament can be traced to early medieval feudal institutions and thought, it was not until after the Norman conquest of England in 1066 A.D., that the institution of the *Curia Regis* established a central assembly of Normans, exercising undifferentiated, executive, judicial and legislative authority, which prepared the way for the ultimate emergence of the institution of modern

ought not to be impeached in any court or judicature.”; N.H. CONST. pt. 1 art. XXX (1784). “The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.”

⁵ 4 Mass. 1 (1808).

⁶ See generally, WITKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921); TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TUNIC CONQUEST TO THE PRESENT TIME (11th ed., 1960); MAY, TREATISE ON THE LAW, PRIVILEGE, PROCEEDINGS, AND USAGE OF PARLIAMENT (16th ed., 1957); HOLDSWORTH, A HISTORY OF ENGLISH LAW (1927); and NEALE, THE COMMONS PRIVILEGE OF FREE SPEECH IN PARLIAMENT in *Tudor Studies* (Seton-Watson ed., 1924).

parliament with its clearly differentiated and distinguishable law-making authority.

Throughout much of its earliest history, Parliament exercised judicial or adjudicatory functions. It was recognized as the highest court in the realm and was, in a sense, a court of equity jurisdiction for the purpose of resolving disputes involving new points of law.

The importance of the judicial role and background of Parliament as a matter of historical fact is crucial, as Professor McIlwain has recognized,⁷ for any proper understanding of the otherwise confusing conflicts which raged between Parliament, the Privy Council, the courts, and the Crown itself throughout much of later English history.

With the outbreak of the struggle for power between Parliament and the Stuart Kings, and the civil warfare which resulted from it, Parliament gradually became conscious of itself as a sovereign legislative body. While shifting the emphasis of its activity away from judicial and administrative matters to legislative matters, it never completely abandoned its earlier judicial characteristics.

Professor Carl Wittke elucidated this point when he wrote:

It is by no means an exaggeration to say that these judicial characteristics colored and influenced some of the great struggles over privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court—the highest court of the realm, often acting in a judicial capacity and in a judicial manner—persisted longer than in the history of privilege of Parliament.⁸

Historically, conflict between Parliament and the Crown has been essential to the evolution of the doctrine of legislative privilege. The English Bill of Rights of 1689, enacted by Parliament following the Glorious Revolution of 1688, proclaimed: "that the freedom of speech, and debate, and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Underlying that classic formulation of the doctrine in 1689 was a bitter and protracted history of conflict and disagreement, especially during the Tudor and Stuart monarchies, over their respective powers. The Crown, in particular, was greatly disturbed at the

⁷ See, *preface and introduction* to C. H. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY*.

⁸ WITKE, *supra* note 6 at 14.

increasing assertions of greater parliamentary power, particularly Parliament's intrusions into the once sacrosanct and reserved areas of royal succession and religion. The clashes which ensued from the Crown's efforts to repress the growing power and independence of Parliament were in large measure responsible for the clear-cut enunciation of the doctrine of legislative privilege in the statement of fundamental rights which was adopted in 1689.

Since the earliest part of the reign of Henry VIII, the practice had developed and become generally accepted that the Speaker of the House of Commons would at the very outset of a new legislative session present a petition to the King claiming and reasserting the ancient rights and privileges of the House of Commons. In some form or other, the Speaker's Petition goes back to the Middle Ages when the Speaker made an official protestation to the King to absolve himself or the members of his House from the consequences of error or the incurred displeasure of the King. Generally speaking, these rights and privileges included freedom from arrest, freedom from molestation for members and their servants, the right to decide disputed elections, authority to take disciplinary action against any person, member or non-member, who in any way insulted or injured the House or any of its members, an admittance to the royal presence, the claim to have the Crown place a favorable construction upon all of the proceedings of the House, and freedom of speech in debate. The record of Speakers' Petitions have been found in the Rolls of Parliament as early as 1377.⁹

⁹ WITKE, *supra* note 6 at 21.

It should be pointed out that since the focus of this article is upon the doctrine of legislative privilege of speech and debate as a bar to criminal prosecution, we will not explore except in passing many of these other rights and privileges such as the legislature's right to resolve disputed elections, legislative freedom from arrest and molestation, and legislative freedom from libel and slander suits. For some further studies of these problems: *See generally*, *Legislative Power to Judge the Qualifications of its Own Members*, 19 VAND. L. REV. 1410 (1966); *The Power of the Legislature to Disqualify Members-Elect*, 45 N.C.L. REV. 524 (1967); A. F. Charles, *They Shall Not Be Questioned In Any Other Place: A New Look at Legislative Immunity*, 3 LAW IN TRANSITION QUARTERLY 45 (1966); Van Vechtor Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910); Leon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 PENN. L. REV. 960 (1951) and Oppenheim, *Congressional Free Speech*, 8 LOY. L. REV. (1956).

It should also be pointed out that this article does not concern itself with such important issues as the legitimate scope and power of legislative investigating committees, abuses of power by such committees, and the violation of citizen rights before such committees. For a recent study of these issues, *see generally*, K. Milliken, *Congressional Investigations: Imbroglia In the Courts*, 8 WM. & MARY. L. REV. 400

Historical records indicate that in 1541 the privilege of freedom of speech in Parliament seems to have been included for the first time in the Speaker's Petition.¹⁰ Undoubtedly, freedom of speech had been claimed earlier but this appears to be the first time that it was made an official part of the Speaker's Petition.

In 1512, one of the earliest and most significant cases involving the doctrine of legislative privilege was brought to the attention of the House of Commons. Richard Strode, a member of Commons from the Devonshire constituency, had authored and introduced legislation regulating certain abuses in the Cornwall tin industry which appeared to have been motivated by considerations of personal interest. For his personal interest in the bill, he was brought to trial in a local Stannary Court, a court of special jurisdiction dealing with tin miners and their problems. He was charged with having violated a local ordinance against the obstruction of tin mining.

Strode was found guilty, heavily fined and imprisoned. Ultimately, he was released as the result of a special bill passed by Parliament. This special bill annulled the judgments and executions against Strode and further provided that no suits or charges might be brought against Strode or his accomplices in the future. The special bill stated, *inter alia*:

That suits, accusements, condemnations, executions, fines, punishments, corrections, grievances, charges, and impositions, put or had, or hereafter to be put or had, unto or upon the said Richard, and to every other of the person or persons afore specified that now be of this present Parliament, or that of any Parliament hereafter shall be, *for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect.*¹¹

In the long annals of those zealous and fearless parliamentarians who struggled at great personal risk and self-sacrifice to assert and establish the doctrine of legislative privilege, no men occupy a

(1967) and K. Milliken, *Limitations on the Congressional Power of Investigation*, 8 WM. & MARY L. REV. 630 (1967).

¹⁰ WITKE, *supra* note 6 at 23. Wittke still subscribes to what Professor Clarke has called "the old theory that this right (freedom of speech and debate) was established by the *Haxey Case* in 1397" (see M. P. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONY* at 5, 1943). More modern scholarship has discounted the significance of this early case. *Id.* at 93; See generally, NEALE, *supra* note 6.

¹¹ See, WITKE, *supra* note 6 at 25 n.16.

more revered place than that of the Wentworth brothers, Peter and Paul.

Beginning in approximately 1558, the Parliament began to petition Queen Elizabeth on the subject of her marriage and the succession. In 1556, a joint committee of the two Houses of Parliament presented a petition on the matter of the succession, but received only the usual non-committal, non-responsive answer from the Queen. The House of Commons reverberated with bold and fiery speeches remonstrating against the Queen and her attitude on the succession issue. The Queen was deeply offended and incensed at what she regarded as invasions of her royal prerogatives. Summoning a group of members of Parliament before her, she proceeded to berate them and further endeavored to silence her parliamentary critics. She forbade further discussions in Parliament of such matters of state.

Immediately Paul Wentworth raised the question of whether or not such restraints did violate the liberties and privileges of the House of Commons. A lengthy debate ensued during which time the Queen sent for the Speaker and ordered him to stop the discussion, but to no avail. The Queen was forced to yield.

When Parliament met again in 1571, Paul Wentworth made a most significant and noteworthy speech to his assembled colleagues in the House of Commons calling their attention to the necessity and importance of preserving the liberties of the House against the interference of the Crown. At about that time, the House learned that one of its members, a Mr. Strickland, had been called before the Queen's Council and forcibly restrained from attending Parliament's sessions because he had introduced a measure to reform the Common Prayer Book. Supporters of the Queen attempted to point out that Strickland was not detained for having delivered a speech in the House of Commons, but rather for "exhibiting a bill into the House against the Prerogative of the Queen."¹²

Completely unsatisfied with such an explanation, the Commons continued to clamor for and demand its privileges. Queen Elizabeth once again backed down and Strickland was returned to his seat the next day.

Shortly thereafter, however, the Queen gave specific orders to the Speaker to instruct the House of Commons to stop wasting its time in long speeches. The Lord Keeper, in his address to the

¹² WITKE, *supra* note 6 at 26.

House of Commons at the close of the session, publicly condemned those members of the House "who in the proceeding of this session, have shewed themselves audacious, arrogant, and presumptuous."¹³

Undaunted by the attitude and feelings of the Crown, the members of the House of Commons in their session in 1575 began to consider a bill on the rites and ceremonies of the church. They were quickly ordered not to meddle in religious affairs which were the exclusive prerogative of the Queen.

During the same parliamentary session of 1575, Peter Wentworth delivered a lengthy address to his colleagues on the infringement on the liberties and privileges of the Commons by the Crown. Wentworth pointedly observed that quite frequently "a rumor runneth about the House Take heed what you do, the Queen liketh not such a matter, whosoever prefereth it, she will be offended with him" ¹⁴ Such rumors, royal messages, or commands from the Crown, he declared, constitute flagrant violations of the rights of the House of Commons and cannot be permitted to go unchallenged.¹⁵

Peter Wentworth delivered what must be regarded as the most remarkable speech on the rights and liberties of the Parliament of England.¹⁶ In the midst of his speech, he was stopped by the House

¹³ I COBBETT, *PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803* 766-67 (1806-20).

¹⁴ *Id.* at 785-86.

¹⁵ See WITTEKE, *supra* note 6 at 26; See also J. E. NEALE, *ELIZABETH I AND HER PARLIAMENT* at 321.

¹⁶ Mr. Speaker, I find written in a little volume these words in effect:

Sweet indeed is the name of liberty and the thing itself a value beyond all inestimable treasure. So much the more it behoveth us to take heed lest we, contenting ourselves with the sweetness of the name only, do not lose and forgo the value of the thing. And the greatest value that can come unto this noble realm . . . is the use of it in this House. . . .

I was never of Parliament but the last and the last session [*i.e.*, 1571 and 1572], at both which times I saw the liberty of free speech, the which is the only salve to heal all the sores of this Commonwealth, so much and so many ways infringed, and so many abuses offered to this honorable Council . . . that my mind . . . hath not been a little aggrieved. . . . Wherefore, to avoid the like, I do think it expedient to open the commodities that grow to the Prince and whole States by free speech used in this place. . . .

I conclude that in this House, which is termed a place for free speech, there is nothing so necessary for the preservation of the Prince and State as free speech, and without it it is a scorn and mockery to call it a Parliament House, for in truth it is none, but a very school of flattery and dissimulations, and so a fit place to serve the Devil and his angels in and not to glorify God and benefit the Commonwealth. . . .

Free speech and conscience in this place are granted by a special law, as that

and placed in the custody of the Serjeant of the House. He was subsequently called to account and questioned by a committee appointed by the House which included Privy Council members and other state officials. Interrogated on the abusive and disrespectful language which he had used regarding the Queen, Wentworth took the position that if the committee were conducting its hearing on behalf of the Crown, he would refuse to answer any of its questions since it had no authority to question him. On the other hand, if this committee were acting as a committee of the House of Commons, he would then willingly answer its questions since only such a duly constituted body had any authority to examine him. Wentworth was committed to the Tower where he remained imprisoned for over a month until the Queen offered her pardon and stated her willingness to have him released.

In 1587, Peter Wentworth again raised the issue of parliamentary privilege by presenting a long list of questions concerning the rights of freedom of speech in the House of Commons to the Speaker. Instead of dealing with these questions himself or placing them before the House, the Speaker gave them to a member of the Privy Council and Wentworth soon found himself incarcerated once again in the Tower. Historical records fail to disclose exactly how long he remained confined there, but in 1592, he joined with one Bromley in the presentation of a petition to the Lord Keeper concerning the succession for which both of them were subsequently called before the Privy Council and committed to the Tower for an indefinite period.

During the same session of 1592, the House of Commons debated the issue of the abuses and shortcomings of the ecclesiastical courts of the realm. In some strange and mysterious way, the Queen became aware of the proceedings, summonsed the Speaker and ordered the House not to interfere in matters of state or of church. The bill was quickly quashed and its sponsor speedily committed to the Tower.¹⁷

These dramatic confrontations between proponents of parliamen-

without which the Prince and State cannot be preserved or maintained. It is a great and special part of our duty and office, Mr. Speaker, to maintain freedom of *consultation and speech* . . . I desire you from the bottom of your hearts to hate all mesengers, talecarriers, or any other thing, whatsoever it be, that any manner of way infringe the liberties to this honorable Council. Yea, hate it or them, I say, as venomous and poison unto our Commonwealth, for they are venomous beasts that do use it. NEALE, *supra* note 15.

¹⁷ WITKE, *supra* note 6 at 27-28.

tary privilege and supporters of the royal prerogative were not confined only to assertions of authority under the Tudor monarchy. They continued on during the period of the Stuart Kings.

In 1621, during the reign of King James I, the House of Commons entered upon a long discussion of the Spanish marriage and the affairs of the Palatinate. Obviously much disturbed by this situation, James ordered the Speaker to direct the Parliament to refrain from indulging in "the mysteries of state."¹⁸ He further warned the members that he thought himself "very free and able to punish any man's misdemeanors in Parliament as well as during its sitting as after"¹⁹ A select committee was appointed and respectfully petitioned the King urging him not to listen to the private reports which came to his attention concerning the deliberations of the House. The petition also recited a correct version of the incident in the House that had caused the difficulty.

One week later, King James I replied by letter.²⁰ Dissatisfied with the equivocal language of the King's letter, the House of Commons insisted that the privileges which belonged to their members were derived by "prescription, time out of mind, and not by toleration."²¹ In due course, another committee was established and drew up a report which was entered upon the official journal reasserting that privilege was "the antient and undoubted birthright and inheritance of the subjects of England."²² James was thoroughly outraged, sent for the journal, and with his own hands (*manu sua propria*) tore out the report and destroyed it. He de-

¹⁸ WITKE, *supra* note 6 at 28.

¹⁹ I COBBETT, *supra* note 13 at 1326. See also, WITKE, *supra* note 6 at 28 n.26-27.

²⁰ We wish you to remember that we are an old and experienced King, needing no such lessons, being, in our conscience, freest of any king alive, from hearing or trusting idle reports. . . . We cannot omit to show you how strange we think it, that ye should make so bad and unjust a commentary upon some words of our former letter, as if we meant to restrain you thereby of your antient privileges and liberties of Parliament. Truly a scholar would be ashamed so to misplace and misjudge any sentences in another man's book. . . . And though we cannot allow of the stile, calling it, your antient and undoubted right and inheritance; but could rather have wished that ye had said that your privileges were derived from the grace and permission of our ancestors and us; (for most of them grow from precedents, which shews rather a toleration than inheritance) yet we are pleased to give you our royal assurance, that as long as you can contain yourselves within the limits of your duty, we will be as careful to maintain and preserve your lawful liberties and privileges, as ever any of our predecessors were, nay, as to preserve our own royal prerogative. WITKE, *supra* note 6 at 28-29.

²¹ WITKE, *supra* note 6 at 29 n.29.

²² *Id.*

clared the protestations "invalid, annulled, void, and of no effect."²³ Shortly thereafter, refusing to permit any further transgressions upon his royal prerogative, James dissolved the Parliament giving as one of his major reasons that the House of Commons "either sat silent, or spent the time in disputing of privileges, descanting upon the words and syllables our Letters and Messages."²⁴ He promptly directed and, in fact, sent several of the more "ill-tempered spirits" among the members of the House to the Tower.²⁵

One of the most celebrated cases involving the privilege of freedom of speech in Parliament concerns the arrest of Sir John Eliot, Denzil Holles, and Benjamin Valentine by order of King Charles I in 1629.²⁶ These three outstanding members of the House of Commons were prosecuted in the Court of King's Bench, after Parliament's dissolution, for speeches which they had delivered in the House which the King regarded as dangerous, libellous, and seditious. The three accused members of the House of Commons challenged the jurisdiction of the Court of King's Bench to try them, asserting that their offenses, if any, were punishable by Parliament, and by Parliament alone, and that no other court was competent or had jurisdiction to try them for speeches made in Parliament. "Words spoken in Parliament, which is a superior court," they asserted, "cannot be questioned in this court, which is inferior."²⁷ The royally-dominated court rejected this argument, found them guilty, imprisoned them, and further imposed heavy fines upon them. Speaking for the court, Judge Sir William Jones observed: "We are the judges of their lives and lands, therefore of their liberties."²⁸

This decision was extremely unpopular throughout the country. It was one of the most significant factors in the growing opposition to King Charles I and his policies. It made a lasting impression upon the House of Commons which never forgot this unwarranted invasion of their ancient rights, privileges, and liberties. When the first opportunity presented itself in 1641, the House of Commons lost no time in adopting resolutions declaring that these entire proceedings against Eliot, Holles, and Valentine were a direct breach of parliamentary privilege. While the Civil War thwarted further action, the case was reopened after the Restoration.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 29 n.30.

²⁶ See WITTKE, *supra* note 6 at 29; See also 3 HOWELL, ST. TR. 296.

²⁷ 3 HOWELL, ST. TR. 296.

²⁸ *Id.* at 306.

In early November, 1667, the House of Commons sought to remove all future doubt as to existence of the parliamentary privilege of freedom of speech by adopting a resolution declaring Strode's Act of 1521, guaranteeing freedom of speech, a public, not a private bill. They specifically stated that Strode's Act was a general law declaratory of "the ancient and necessary rights and privileges of Parliament."²⁹ Later in November, they declared the specific judgments against Eliot, Holles and Valentine illegal and breaches of privilege.³⁰

After the Revolution of 1688, Parliament, as we have seen, made the doctrine of parliamentary privilege of freedom of speech an essential part of the Bill of Rights of 1689. In that same year, the House of Commons summoned two judges of the King's Bench to its bar to answer for a judgment they had given which was adverse to the claim of the privileges of the House involving matters other than freedom of speech. The House, after hearing their defense, resolved that the two judges—Pemberton and Jones—had broken the privileges of the House by dismissing the plea to the jurisdiction of the Court of the King's Bench and the two judges were imprisoned.

It is difficult not to agree with Professor Carl Wittke's conclusion that after "the Revolution of 1688 and the consequent Bill of Rights, the privilege of freedom of speech and debate in Parliament was never again seriously questioned or denied."³¹

But while the existence of the parliamentary privilege of freedom of speech and debate was never again seriously questioned in England, its proper scope and application were issues in numerous cases which followed. Two of the most important of these cases which were decided in the nineteenth century were *Ex parte Wason*,³² and *Stockdale v. Hansard*.³³

In *Ex parte Wason*, the English court held that a conspiracy by a number of people, including members of the House of Lords, to make false and deliberately misleading statements in the House was not an offense cognizable at law because the courts were powerless to question the motives and intentions of members of Parliament when speaking and debating in Parliament. As Mr. Justice

²⁹ 1 HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS . . . 86 (1796).

³⁰ WITTKÉ, *supra* note 6 at 30.

³¹ *Id.*

³² 4 Q.B. 573 (1869).

³³ 112 Eng. Rep. 1112 (K.B. 1839).

Lush stated it: "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."³⁴

In the historic case of *Stockdale v. Hansard*, which ultimately led to the adoption of the Parliamentary Papers Act of 1840, giving a summary protection to persons employed in the publication of parliamentary documents, records, and papers, Lord Denman set forth a classic description of the scope of the parliamentary privilege of freedom of speech and debate as it had developed up to that time, in the following words:

[T]he privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by the princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher.³⁵

In considering the application of the parliamentary privilege to the American colonies and to the growth of American legislative institutions, it is necessary to recall that most of the colonies were founded in the seventeenth century by Englishmen who were deeply aware of the influence and practices of the English Parliament of that era. It is not surprising, therefore, to find colonial assemblies deeply concerned about their privileges.³⁶

The same struggles which occurred in the mother country between privilege and prerogative were fought out in each of the colonies with varying degrees of success, depending upon the personalities and power of the participants. In the colonies there was conflict between the legislative assemblies and the royal governors.

³⁴ 4 Q.B. 573, 577 (1869).

³⁵ 112 Eng. Rep. 1112, 1156 (K.B. 1839).

³⁶ See generally, CLARKE, *supra* note 10 at 12.

But there was also conflict as to the proper relationship and relative power of the English Parliament and the various colonial assemblies. While in contemplation of legal theory, it might be difficult to argue successfully that the American colonial assemblies had any real judicial power or any formally recognized rights as legislative bodies, in point of fact it is clear that they did exercise judicial powers and did assert and establish legislative privileges.³⁷

The newness of the American political and constitutional soil provided unprecedented opportunities for innovation in the development of representative institutions with all their attendant powers. In the inevitable growth and development of such institutions, English parliamentary precedents provided the experimental models from which, in effect, a whole series of miniature Parliaments grew up on American soil. The American colonial experience with the conduct and operation of such representative institutions provided the rich and fertile background, particularly in the area of the doctrine of legislative privilege, which led the way to the inclusion in the state constitutions after 1776 of language essentially similar, if not virtually identical, to the legislative privilege of freedom of speech and debate which was contained in the English Bill of Rights of 1689. The Articles of Confederation of 1777, the Maryland Declaration of Rights of 1776, the Constitution of the State of Massachusetts of 1780, the Constitution of New Hampshire of 1784, for example, all of which predated the United States Constitution of 1789, gave explicit recognition to the legislative privilege and the essentiality of freedom of speech and debate in any functioning system of representative government.³⁸

It is clear, as the United States Supreme Court itself was later to enunciate, that "[t]he provision [of legislative privilege of freedom of speech and debate] in the United States Constitution was a reflection of political principles already firmly established in the States."³⁹ The pertinent clause of article I, section 6, was adopted without opposition by the founding fathers at the Philadelphia Convention. Only two proposals with respect to this provision were suggested and neither gained acceptance. William Pinckney proposed that it should be provided that each House should be the sole and exclusive judge of the extent of the privilege granted

³⁷ *Id.*

³⁸ The constitution of virtually every state in the union now contains a provision embodying the doctrine of legislative privilege of freedom of speech and debate.

³⁹ *Teeny v. Brandehove*, 341 U.S. 367, 373 (1951).

whereas James Madison advocated that the extent of the privilege should be delineated.⁴⁰

While the American doctrine of legislative privilege of freedom of speech and debate was originally derived from, and dependent upon, English parliamentary experience, the totally different conceptions and roles of the two legislative bodies—the English Parliament and the United States Congress—in their respective constitutional systems led to a sharp divergence in the scope and application of the privilege in the two countries. The United States Congress and American state legislatures, have operated as a coordinate branch of a tripartite governmental structure. Whereas in the English system, the English Parliament possesses absolute supremacy since legislative and executive powers are fused together, and the tradition of Parliament as the highest court of the realm continues to possess some real, if diminishing, meaning. The United States Congress and American state legislatures possess constitutionally limited lawmaking powers. Each branch is coordinate and coequal and subject to the constitutionally mandated checks and balances of the other two branches, and no past history or tradition as an instrumentality of government exercising broad judicial powers as the highest court of the land exists.

The differing roles of the English Parliament and the American Legislature, past and present, have produced significant differences in the scope and application of the privilege. When Parliament, with its plenary powers and earlier judicial tradition, finds that its privilege of freedom of speech and debate has been violated, it can imprison the offender for contempt and its decision to imprison is not reviewable by any court of law. The United States Congress and the American state legislatures do not possess such broad powers to punish for contempt. An act must seriously obstruct the functioning of the legislative process before Congress can move forward to cite an offender for contempt and any such action by the Congress is subject to judicial review under the American governmental theory of the separation of powers.⁴¹

In light of the *Johnson* case, which will presently be considered at length, it is significant to point out that English Parliaments have historically reserved to themselves and still retain the sole and exclusive right to punish their members for the acceptance of a bribe in the discharge of their office. No member of Parliament

⁴⁰ J. BUTZNER, CONSTITUTIONAL CHAFF at 47 (1941).

⁴¹ *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

may be tried for such an offense in any court of the land. This body has traditionally regarded such an act as inconsistent with the maintenance of the privilege of freedom of speech and debate, and as tending to undermine public confidence and trust in Parliament.⁴²

III. PRIOR AMERICAN JUDICIAL DECISIONS

The doctrine of legislative privilege of freedom of speech and debate is, as the United States Supreme Court has said, "so well established in our policy [that] there is very little judicial illumination of this clause."⁴³ Prior to the *Johnson* decision, there were a mere handful of cases directly interpreting the speech and debate clause.

In the landmark case of *Kilbourn v. Thompson*,⁴⁴ an action for false imprisonment was brought against the Speaker of the United States House of Representatives and several members of the House for the arrest and imprisonment of the petitioner Kilbourn on the grounds of contempt of the House. The Court held that Congress did not have the power to order the arrest and imprisonment of a private citizen and that Congress had exceeded its powers to punish for contempt. The Court, however, did sustain the demurrer of the congressman holding that legislators came within the immunities granted by the privilege of the freedom of speech and debate clause. Congressmen who initiated, supported, voted or otherwise participated in the adoption of a resolution ordering the arrest and imprisonment of a private citizen for contempt of Congress, could not be questioned in any court for their actions. The Court posed the question: "If a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection . . . ?"⁴⁵ The Court further held that the privilege must be read broadly adding:

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting whether it is done vocally or by passing between the tellers. In short, to things generally

⁴² See Sisitsky, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 337 n.10 (1965-66).

⁴³ *United States v. Johnson*, 383 U.S. 169, 179 (1966).

⁴⁴ 103 U.S. 168 (1881).

⁴⁵ *Id.* at 204.

done in a session of the House by one of its members in relation to the business before it.⁴⁶

In *Cochran v. Couzens*⁴⁷ the Court of Appeals for the District of Columbia, relying upon the reasoning of the decision in *Kilbourn*, held that defamatory words uttered by a United States senator on the floor of the Senate in the course of a speech, but not in the course of a debate, concerning a subject not then pertinent to any matter under inquiry by the Senate, were nonetheless absolutely privileged under article I, section 6 of the Constitution and could not be made the basis for an action of slander in any court. In its decision the court of appeals stated:

It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues.⁴⁸

In *Tenney v. Brandehove*⁴⁹ the United States Supreme Court considered the issue of whether legislative privilege protected a member of the state legislature of California against a suit brought under the Civil Rights Statute,⁵⁰ which provides a civil remedy against those who, under color of state law, deprive or conspire to deprive a person of rights, privileges, or immunities secured by the Federal Constitution. It was alleged that State Senator Jack B. Tenney from Los Angeles County had used his official position and the forum which it provided "to intimidate and silence the plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances. . . ." ⁵¹

The Supreme Court dismissed the suit holding that the doctrine

⁴⁶ *Id.*

⁴⁷ 42 F.2d 783 (D.C. Cir. 1930), *cert. denied*, 282 U.S. 874 (1930); See Chief Judge Soboloff's comment in *United States v. Johnson* 337 F.2d 180, 190 (4th Cir. 1964) re: the impairment of the legislator's constitutional protection against being called upon to answer in "any other place" whether the court proceedings are civil or criminal constituting "the graver inhibition."

⁴⁸ 42 F.2d at 784.

⁴⁹ 341 U.S. 367 (1951).

⁵⁰ 8 U.S.C. § 43, 47(3) (1948).

⁵¹ 341 U.S. at 371.

of legislative privilege conferred immunity from liability upon legislators for acts done within the sphere of legislative activity. Speaking for a unanimous Court, Justice Frankfurter said:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.⁵²

In *McGovern v. Martz*⁵³ the United States District Court for the District of Columbia was called upon to consider motions for summary judgment on the pleadings in a libel action which also involved counterclaims of libel by the defendants. Applying the doctrine of legislative privilege, District Judge Youngdahl wrote:

Its purpose is clear: insure legislative peace of mind. The theory is that in a democracy a legislature must not be deterred from frank, uninhibited, and complete discussion; since "(one) must not expect uncommon courage even in legislators," reprisal by the executive or judicial branches for what legislators say or do within the legislature must be impossible in order to obtain free discussion and the consequent benefits to the public. Thus the privilege is absolute: purpose, motive, or the reasonableness of the conduct is irrelevant.⁵⁴

IV. THE PARADOX OF *Coffin v. Coffin*

While judicial interpretations of the doctrine of legislative privilege of freedom of speech and debate have been few in number, an early Massachusetts case, *Coffin v. Coffin*⁵⁵ occupies a central position of prominence in all subsequent interpretations. It is, indeed, the classic American formulation of the scope and extent of the privilege. And yet, paradoxically, this magisterial statement of the doctrine of legislative privilege came about in a case in which the

⁵² *Id.* at 377.

⁵³ 182 F. Supp. 343 (D.D.C. 1960).

⁵⁴ *Id.* at 346.

⁵⁵ 4 Mass. 9 (1808).

court on the facts presented decided that the legislator did not possess the privilege.⁵⁶

Speaking for a unanimous Court Mr. Justice Miller wrote of the decision in the *Coffin* case:

This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight. We have been unable to find any decision of a Federal court on this clause of section 6, article I, though the previous clause [of the same section] concerning exemption from arrest has been often construed.⁵⁷

The facts of the case were these: In the 1805 session of the Massachusetts House of Representatives, William Coffin, a member of the House, asked Benjamin Russell, a fellow member, to move a resolution in the House authorizing the appointment of an additional notary public for Nantucket. Russell subsequently asked and obtained leave to lay on the table a resolution for that purpose. Micajah Coffin, another member of the House, rose in his seat and demanded to know where Russell had obtained his information of the facts upon which the proposed resolution was founded. Russell replied that he had obtained the information from a "respectable gentleman" from Nantucket.

The resolution had passed, and the Speaker had moved on to other business, when Micajah Coffin crossed the House and came over to the place where Russell was standing talking with several gentlemen in the passageway within the walls of the House. Micajah Coffin then asked Russell where he had received the information. Russell observed lightheartedly that perhaps the "respectable gentleman" was named Coffin, and was perhaps one of Micajah Coffin's relations since many people on Nantucket were named Coffin.

⁵⁶ Many otherwise well-informed students of the doctrine of legislative privilege seem completely unaware of the fact that the classic authoritative language of the *Coffin* case is dicta in that case. Robert M. Thomas, Jr., for example, in a thoughtful and perceptive article, "Freedom of Debate: Protector of the People or Haven for the Criminal?" in the *Harvard Review*, Volume III, Number 3, Fall-Winter, 1965, at page 77, erroneously describes the *Coffin* case as follows: "*Coffin* is an early Massachusetts case in which it was held that even defamatory words only semi-related to the debate and spoken in private conversation on the floor were privileged." The Court, as we shall see, held precisely the opposite.

⁵⁷ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

On observing William Coffin sitting "behind the bar," Russell pointed to him and told Micajah Coffin that William Coffin had furnished him the information. Micajah Coffin looked toward him and said "What, that convict?" Russell was very much surprised and asked Micajah Coffin to explain. Micajah Coffin said: "Don't thee know the business of the Nantucket Banker?" Russell replied, "Yes, but he was honorably acquitted." To which Micajah Coffin further replied, "That did not make him the less guilty, thee knows."⁵⁸

As a result of these facts, William Coffin brought an action for slander against Micajah Coffin. The Court of Common Pleas for the County of Nantucket found for the plaintiff, William Coffin, and assessed damages in the amount of fifteen dollars. Both parties appealed and the case was retried before a jury which returned a verdict against the defendant in the amount of twenty-five hundred dollars damages.

The defendant, Micajah Coffin, did not introduce any evidence to contravene the facts as stated above. Instead, he raised the Massachusetts constitutional provision encompassing legislative privilege of freedom of "deliberation, speech, and debate" (Mass. Const. art. xxi) as a defense or bar to the action.

The confrontation between the supporters and the critics of the doctrine of legislative privilege reached extraordinary heights of perception and understanding of the problem in the arguments advanced by both sides before the Supreme Judicial Court of Massachusetts. Two men—Dexter, Esquire and Attorney General Bidwell—presented the case on appeal for the defendant and sought to convince the court of the applicability of the doctrine of legislative privilege. B. Whitman, Esquire, was counsel for the plaintiff, William Coffin.

Reviewing the origins of the doctrine of legislative privilege in English parliamentary experience, counsel for the defendant asserted to the court that the defendant

has not claimed an exemption from responsibility for what he said of the plaintiff; he has only insisted that the House of Representatives, of which he was then a member, and in which he spoke the words in question, and not the judicial courts, had the cognizance of that subject. . . . The constitution having thus vested the house with *the freedom of deliberation, speech, and debate*, in the most absolute and exclusive terms, and having also given them a discretion-

⁵⁸ 4 Mass. at 24.

any control of the manner in which that freedom shall be exercised, it results that they are the sole judges of the extent of the privilege, and the only tribunal to which the members are responsible for any abuse of it.⁵⁹

Attorney General Bidwell then went on to establish further that the doctrine was settled and well understood that a declaration of privilege by either house of the English Parliament was always respected by the courts as conclusively binding upon them. He further declared that the Supreme Judicial Court should receive with equal respect a declaratory resolve of the House of Representatives of Massachusetts dated March 1, 1808,⁶⁰ (some three years after the facts set forth in this case initially occurred) relative to the privilege of free deliberation, speech and debate.

Counsel for the plaintiff, B. Whitman, requested the Attorney General to inform the court of the purpose for which he was introducing the resolution. "Bidwell said he offered it for two purposes; 1st. To show the claim of the house, and of the defendant as a member of that house. 2d. As an authority decisive of the principle on which the question before the Court ought to be decided."⁶¹ Whitman then objected to the introduction and reading of the resolve charging that it was merely a self-serving declaration of the House made in its own favor upon the request of the defendant, Micajah Coffin, after the actual trial of the cause of action against him.

In answering this objection, Attorney General Bidwell said "that the resolve was a general one, not predicated upon, nor alluding to this particular case, but adapted to all cases coming within its general principle. As it respects a general principle, it can be of no importance, at what time, or upon what occasion, it was adopted."⁶² The House having rendered a decision, Bidwell argued, that decision must be respected by the court in accordance with English parliamentary precedents and with our own system of balanced government.

Whitman urged the court to reject the notion that the claims of the English Parliament constituted any meaningful authority under our state constitution and laws. Chief Justice Parsons pursued this line of reasoning by pointedly asking Bidwell whether he was contending that a declaration of privilege by one branch of the Massa-

⁵⁹ *Id.* at 14-15.

⁶⁰ *Id.* at 15-16.

⁶¹ *Id.*

⁶² *Id.* at 16.

chusetts legislature was an authority to the same extent as a similar declaration by either house of Parliament. Bidwell answered by denying that it was so "as to privileges generally," but insisted that it was so "only as to those privileges which are granted by the constitution to the two houses, such as freedom of deliberation, speech and debate."⁶³ Attorney General Bidwell continued:

Upon the subject of privileges which the constitution has vested in either house, that house is the supreme court, whose decision, as to the nature and extent of the privileges, is final and conclusive. It cannot be reversed for error by any other court. No other tribunal can, without usurpation, undertake to consider whether it is erroneous or not. This is the true theory of our government. . . .⁶⁴

The court then permitted the resolution of the House of Representatives of March 1, 1808,⁶⁵ to be introduced into the record, "reserving for further consideration the effect of it."⁶⁶

Following the reading of the resolution adopted by the House of Representatives, Attorney General Bidwell stated concerning words spoken by a legislator:

No other tribunal has a right to consider whether he uttered them standing or sitting, with his hat on or uncovered, in his proper seat or in some other part of the house, in a public address to the speaker or in private deliberation with another member, after the subject had been moved or before any motion was made respecting it, within the rules of decorum or in transgression of them. If they were spoken by a member in the presence of the house, during its sitting in any manner suffered or not prevented by the house, they are

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The House of Representatives, impressed with their duty to protect the rights of their citizens, and the principles of the constitution, under the safeguard of which they assemble and deliberate for the public good, and to guard, at all times, their own privileges against the undue interference of any other department of the government, do, therefore, RESOLVE, and DECLARE that words spoken by any member, within the walls of this house, relative to a subject under their consideration, either in their separate capacity, or in a convention of both branches of the legislature, (whether the member speaking; such words addresses himself, in debate, to the chair, or deliberates and advises with another member, respecting such subject) are alone and exclusively cognizable by this house; and that for any other tribunal or department of government to interfere with its authority, and take cognizance of words thus spoken, is a breach of the rights and privileges of this house, and a flagrant violation of that important article of the constitution, which expressly provides "*for the freedom of deliberation, speech, and debate, in each house of the legislature.*" *Id.* at 16-17.

⁶⁶ *Id.* at 16.

within the constitutional freedom of deliberation, speech, and debate, in the house; and however improper they may be thought, they cannot be drawn into question in any other court or place whatsoever.⁶⁷

Chief Justice Parsons interrupted Bidwell to ask: "Is the privilege confined to the immediate presence of the house? Would not the members of a committee sitting in the lobby, and deliberating on a subject committed to them by the house, be as much protected, as if they were deliberating in the house?"⁶⁸ The Attorney General replied:

Perhaps they would. That, however, is a point which it may not be necessary to determine in deciding the question before the Court. It is not the object of the defendant's counsel, in this argument, to ascertain with precision the utmost limits to which the privilege may be extended, but to show that it embraces every word spoken by a member of the house, while in actual session, however disorderly or improper; because for any disorder or impropriety the member is amenable to the house, which has the power to punish him for abusing his privilege, and to do justice to any person, who is the object of that abuse; not, indeed, in the form of damages, as in a court of law, but in one adapted to its own forms of proceeding, and not less satisfactory to an honorable mind."⁶⁹

The Chief Justice further asked: "Would you extend the privilege to actions as well as words? Suppose, for instance, one member should assault or beat another in the presence of the house; would he not be answerable in an action, or on an indictment, in a court of law?"⁷⁰

Bidwell replied: "Unquestionably he would. For it is the freedom of deliberation, speech, and debate, only, and not of assaulting and beating, that is secured by the constitution. For other personal injuries and abuses, a member may be answerable or indictable; but not for any abuse of the freedom of deliberation, speech, and debate, in the house."⁷¹

In his argument against the applicability of the doctrine of legislative privilege, B. Whitman, Esquire, contended for the plaintiff that under the American system of government in which

⁶⁷ *Id.* at 17.

⁶⁸ *Id.* at 17-18.

⁶⁹ *Id.* at 18.

⁷⁰ *Id.*

⁷¹ *Id.*

the judiciary is "an original, coordinate, and independent branch of the government, . . . [every] citizen expects to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character."⁷²

Whitman declared:

If the House of Representatives can, by their own act, determine, ultimately and exclusively, the extent of their own powers and jurisdiction, and if they have a right to say, in any instance, that this Court cannot interfere with its jurisdiction, to redress a private wrong or a public mischief, it will follow that, whenever the House of Representatives chooses, by its interference, to take away the subject's remedy, the people must submit to the oppression, or resort to arms in order to dissolve the government and produce a revolution."⁷³

The House of Representatives, Whitman maintained, has no jurisdiction of the facts which are the foundation of the pending action.⁷⁴ Attorney Dexter,⁷⁵ counsel for the defendant, Micajah

⁷² *Id.* at 20.

⁷³ *Id.* at 20-21.

⁷⁴ He further charged:

The provisions of the constitution ought to receive a legal and technical construction, if consistent with the apparent intention of the framers of the instrument, so as, if possible, to prevent the mischief intended to be guarded against, or to obtain the good intended to be produced; in other words, to effectuate the intentions of the people in that fundamental act. Thus it is apparent that, by the twenty-first article in the declaration of rights, nothing more was intended, than to secure to the individual members of the two houses the independent exercise of their offices, the privilege of doing whatever was proper and necessary for them to do as legislators. The word "either house of the legislature" cannot intend the walls or building which cover and surround the members. They plainly intend the aggregate assembly of members, organized, and in the exercise of the functions allotted to them. In the standing rules and orders of the House of Representatives, there are more than fifty instances, in which the word *house* has the signification here contended for. And so long as a member is occupied as such, is actually in the exercise of his functions as a member, so long, and no longer, is he entitled to the privileges contained in that article; so long, and no longer, is he to be considered, for the purposes of that article, a member of the house.

Further, we contend that, to be entitled to this high immunity and privilege, the member must be within the standing rules and orders of the house. By one of those rules it is provided that "*No member shall speak out of his place, nor without first rising and addressing the speaker, and shall sit down as soon as he is done speaking.*"

The *deliberation, speech, and debate*, to which the constitution has annexed this great immunity, must intend the public discussion of some subject under consideration, such speech and debate as is permitted by the rules and orders of proceeding, which the house has established to restrain and control its members.

Coffin, had the final opportunities to rebut some of the legal points which had been made by B. Whitman. He argued vigorously and

So in the case at bar, had the defendant spoken the defamatory words complained of, or even words more slanderous, if such can be conceived, in regular and orderly debate, the constitution would have protected him. But the facts were altogether otherwise. The subject was not then under consideration, was not before the house. The defendant was not in his place, did not address the house, nor the speaker. On the contrary, he was at that moment breaking the orders of that body, from who he now asks protection; he was bound to attend to the subject then before the house, and being wandering from his *place and duty*, forfeited, for the time, his claim of privilege.

Suppose that the plaintiff, instead of coming here to obtain satisfaction for the injury he has sustained, had applied by petition to the House of Representatives, stating the facts, and praying their animadversion upon the defendant. Waiving, for the present, the futility of any remedy in the power of the house to furnish, they would have answered him, and properly too, "This was a private conversation between two members of our body, relating to a subject not in debate at the time: we have no authority in the case. The courts of law are open to you; there you are at liberty to seek your remedy, and there you will undoubtedly find it." *Id* at 21-23.

⁷⁵ The pertinent parts of Attorney Dexter's argument are as follows:

The declaratory resolution of the house, which was read in the opening of the argument, is not a new law; it is rather a judicial explanation of the law as it stood; a practical exercise of their right to construe the constitution, so far as it relates to their own privileges. And it contains no extended or extravagant claim of jurisdiction; nothing more than is necessary to secure that freedom of deliberation, speech and debate, assured to them by the constitution.

They claim the exclusive cognizance of words spoken by a member within the walls of the house, relative to a subject matter under consideration, either of the representatives alone, or of the two houses in convention; whether the member speaking the words addresses the chair, or deliberates with another member on such subject.

Now, by "a subject matter under consideration" must be understood, not merely a subject at the very instant under debate; but the phrase must include one which has been before the house, and is not yet finally determined; and whether any other matter is before the house at the moment, cannot, in the nature and reason of the thing, make a difference. It is necessary to deliberate in various ways and forms. Subjects, for instance, are commonly referred to committees in their various stages. It is the duty of such committees to deliberate, and they must be protected in their deliberations, or the end of their appointment will be frustrated.

Whenever a measure is proposed to the house, it is the right, and it is the duty, of every member, to communicate to his brethren the information he possesses, and to obtain such as he may need.

Further, the members have a right to deliberate and confer with each other on a measure not yet publicly moved, and they must be protected and privileged in the exercise of such right. Suppose, for example, a member contemplated an impeachment of a certain public officer; it would be his duty to confer with his brethren, and their duty to confer with him, on the propriety and expediency of the proposed measure; to scrutinize the character and conduct of the officer. And shall it be said that for the exercise of this duty a member is

eloquently for the assertion of a far-reaching doctrine of legislative privilege.

After due deliberation, Chief Justice Parsons delivered the decision for a unanimous court. He chose

not [to] confine it to delivering an opinion, uttering a speech, or haranguing in debate; but . . . [to] extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and . . . [to] define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. . . .

He cannot be exercising the functions of his office as member of

amenable in this Court in an action for slander? Is not a principal benefit and effect of the provision of the constitution annihilated by such a construction of it?

In the case before the Court, it appears that a motion had been laid on the table, which had not been finally acted upon. It was at the time, then, a subject of deliberation. Before the defendant could obtain the information he needed or wished for on the subject, another subject came before the house. He then took the orderly and proper course to obtain the information he had a right to obtain. In this state of things, he spoke the words complained of. The question is not, what were the defendant's motives for speaking the words; what was his offence; whether the words were true or false, malicious or not; but whether he is liable to any other jurisdiction for that offence, be it what it may, than the House of Representatives, in whose presence they were spoken; whether he is amenable in this Court, in this action, for these words thus spoken.

The defendant had a right to take every lawful measure in his power to prevent what he might think an unnecessary or improper act. He might have persuaded Mr. *Russell* to move for a reconsideration of the resolve that had just passed. It is presumable that he spoke the words with that view. If he had succeeded in the intention,—if he had, by this means, procured a decision of the house conformed to his wishes,—it would not be denied that the words were spoken relatively to a subject matter under consideration. But surely his failure of success cannot render him more liable to the plaintiff's action, than he would otherwise have been. It is possible, also, that he might suppose that the plaintiff was a candidate for the proposed appointment.

The rules of the house were cited by the plaintiff to show that the defendant was not protected by them. But for this Court to look into those rules, in order to determine whether the defendant is or is not protected by them, would be to decide the very question of jurisdiction about which the parties are now contending. Those rules are adopted by the house for the preservation of decorum among the members, and for the orderly conducting of the business of the house. The very question, whether a member has or has not transgressed those rules, is proper to the House of Representatives. They have prescribed the rules; they have affixed the penalty to the breach of them, and they claim the sole and exclusive right of applying the penalty in every case of a breach. *Id.* at 25-27.

a body, unless the body be in existence. The house must be in session, to enable him to claim this privilege; and it is in session, notwithstanding occasional adjournments, for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member, is in session and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions, as a representative, in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege, when executing the duties of his office, in a convention of both houses, although the convention should be holden in the senate chamber.

To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident, to demand of any of its members a retraction, or apology, of or for anything he has said, while discharging the duties of his office, either in the house, in committee, or in a convention of the two houses, on pain of expulsion. But if it is allowed that remedy is inadequate, then a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.⁷⁶

Having thus construed the doctrine of legislative privilege in these most liberal terms, Chief Justice Parsons then went on to apply these principles in a narrow and most restrictive way to the specific issues of the case before the court: Was Micajah Coffin, the defendant, executing the duties of his office when he spoke the defamatory words? Was he acting as a representative? The court asserted that if he was, he was entitled to his claim of privilege. But if he was not, he was not entitled to his claim of privilege since he was then merely speaking and acting as a private citizen.

After due deliberation, the court rejected the claim of privilege contending that Micajah Coffin was not executing the duties of his office and acting as a representative when he spoke the defamatory

⁷⁶ *Id.* at 31-32.

words. Paradoxically, the court, after having asserted the existence of a broad, sweeping privilege which appeared to encompass Micajah Coffin's activities, chose to apply that privilege in such a narrow, arbitrary and restrictive manner as to seriously undermine its utility and value.

In applying the doctrine of legislative privilege, to specific situations, the court in the *Coffin* case interposed a condition precedent to the exercise of legislative privilege, that is, the official conduct or official duties test. To be entitled to the claim of privilege a legislator must first prove to the satisfaction of the court that his language or conduct is "in the character of a representative"⁷⁷—i.e., in the execution of his official duties as a legislator.

In the *Coffin* case, the court erected three theoretical alternatives which might exist where the issue of slander might be confronted by the defense of legislative privilege: 1.) If the words were uttered in the execution of his official duties, although they were spoken maliciously, the legislator is entitled to his claim of privilege and is not answerable; 2.) If the words were not uttered in the execution of his official duties, and if they were not spoken maliciously, with an intent to defame the character of any person, the legislator is not entitled to the claim of privilege and is, of course, not answerable; and 3.) If the words were uttered maliciously, and if they were not spoken in the execution of his official duties, then the legislator is not entitled to his claim of privilege and is answerable.

The court held that the latter alternative applied to the facts in the *Coffin* case. Micajah Coffin was not engaged in the execution of his official duties when he uttered the defamatory words because 1.) the subject matter of the resolution, or of the information, was not before the House; 2.) on all the facts, it was not possible for the court to conceive of any other motive for the indiscreet language except the intention to defame; and 3.) the inquiry was that of a private citizen satisfying his curiosity and might very well have been made, for all the purposes intended by the legislator, on State Street as well as in the House chamber.

There can be little quarrel with the interposition of an official conduct or official duties test as a condition precedent to the exercise of legislative privilege when such a test is broadly construed and liberally interpreted in its application. No one would seriously

⁷⁷ *Id.* at 34.

argue that legislative privilege inheres in a legislator even when he is not acting as a legislator or not engaged in activities related to his legislative duties. But to establish as critical indicia of official conduct or duties such tests as the court applied in deciding the *Coffin* case would be to restrict and severely circumscribe the range of language and conduct which lies within the permissible ambit of privilege.

In analyzing the *Coffin* decision, it is impossible to escape the conclusion that the court, in its application of the liberal doctrine of legislative privilege which it had itself enunciated, drew back from the full implications of its own language and rendered a restrictive decision which contained within its own inner logic the seeds of subversion of the doctrine of legislative privilege itself. Most of those who cite the sweeping language of the assertion of principle in the decision seem totally unaware of this fact or at best regard it as relatively insignificant. But in an area of constitutional interpretation where a paucity of cases exists, it is essential to understand the true dimensions of the decision in such a landmark case.

In its specific application of the doctrine of legislative privilege, the reasoning of the court was faulty, ill-conceived, and regrettably unfortunate. There appears to be no valid and convincing reason for denying to Micajah Coffin the claim of privilege to which he was entitled. Every one of the court's specific conclusions with respect to Micajah Coffin's language and conduct was open to serious question.

To begin with, when the court says that the subject matter was not before the House, the fact is, as the court explicitly recognized, any member could have moved to reconsider or rescind the resolution. While the resolution had carried prior to the uttering of the defamatory words, and other matters were then under consideration on the floor of the House, there still existed a legitimate legislative interest in the matter. Final action on the choice of the individual to fill the position was not to take place until later that afternoon or perhaps even the next day. There was no justification to the court's insistence that the application of the privilege requires that a matter be technically before the House—*i.e.*, under immediate consideration, particularly in a state such as Massachusetts whose constitution provided for freedom of deliberation as well as speech and debate. The court's insistence on the technical parliamentary requirement that a matter must be before the House,

was to impose an unduly harsh limitation upon the ability of legislators to deliberate free from the fear of outside interference by the executive or judicial branches. To make any legislative language or conduct before or after a matter under direct and immediate consideration on the floor unprivileged, is to close off from immunity a wide area of legitimate, defensible and necessary legislative activity.

Secondly, the fact that the court claimed that it could conceive of no other motive for the indiscreet language except the intention to defame was as much a testament to the court's sterility of imagination as to its moral abhorrence of the language used. Micajah Coffin may well have used harsh, abusive and improper language in an effort to persuade Russell that he had erred in moving the resolution, or perhaps that he had been deceived or exploited by relying upon his colleague, William Coffin. Micajah Coffin may even have entertained the hope that he could shock Russell into moving to rescind his action or at least cause him to demand additional information from William Coffin. Such motivations had indeed been effectively urged upon the court by the defendant's counsel, Dexter, in his final argument. Micajah Coffin had every right—perhaps it might even be said it was his duty—to inquire into the basis of Russell's resolution since he represented the Nantucket constituency in the House of Representatives. But the court's refusal to regard this inquiry as part of the defendant's official duties, combined with its inability or unwillingness to concede that even the indiscreet language which was used could have been intended for any other purpose than to defame, made it necessary for the court to inquire at length into the nature and operations of the legislative process. Most significantly, its restrictive application of the privilege doctrine forced it into an examination of the purposes, motives, and reasonableness of the legislative language and conduct involved, the very things which the privilege was historically developed to prevent.

Finally, the court was in error in holding that Micajah Coffin's inquiry was a private one based on curiosity. For the reasons which have been set forth above, Micajah Coffin was engaged in the execution of his official duties when he initiated his entirely proper inquiry. The mere fact that such an inquiry could also have been made somewhere other than within the House does not, and should not on the facts at issue, operate to deprive the defendant legislator of the claim of privilege to which he is entitled.

V. THE *Johnson* CASE: THE LIMITATIONS OF LEGISLATIVE PRIVILEGE CONSIDERED

Thomas F. Johnson, a former United States Congressman from Maryland, had been convicted in the United States District Court for the District of Maryland along with another former member of Congress and two other defendants of charges involving violations of the federal conflict of interest statute and of conspiracy to defraud the United States.⁷⁸ Specifically, Johnson had been indicted on seven counts of conflict of interest and on one count of conspiracy to defraud. The conspiracy count of which Johnson and his three co-defendants were found guilty consisted in general of an agreement among Johnson, Congressman Boykin of Alabama, and two individuals who were connected with a Maryland savings and loan institution whereby the two congressmen were to exert influence upon the Department of Justice to secure the dismissal of pending indictments of the savings and loan company and its officers on mail fraud charges. In furtherance of this general conspiratorial scheme, it was further charged that Johnson had conspired for compensation to deliver a speech, favorable to independent savings and loan associations, on the floor of the House of Representatives. The company then arranged to distribute thousands of copies of the speech in order to allay the apprehension of potential depositors.

Evidence was introduced at trial, and presumably the jury found, that the two congressmen approached Attorney General Robert Kennedy and the Assistant Attorney General in charge of the Criminal Division and urged them to review the mail fraud indictments; that Johnson received substantial sums of money in the form of campaign contributions and legal fees; that these payments were never disclosed to the Department of Justice; that the Department of Justice never regarded Johnson as an attorney for a client, but rather as a congressman interceding for a constituent; and that the United States was thus defrauded of its right to have the official business of the Department of Justice conducted honestly, free from unlawful, improper and undue pressure, as well as defrauded of its right to have the faithful, loyal and conscientious services of the two defendant congressmen, free from corruption, in the discharge of their lawful functions and duties.

Congressman Boykin did not appeal from the guilty verdict of the

⁷⁸ United States v. Johnson, 383 U.S. 169 (1966).

United States District Court of Maryland. Johnson, together with the two other defendants, did appeal.

On September 16, 1964, the United States Court of Appeals for the Fourth Circuit, in a masterly erudite opinion written by Chief Judge Sobeloff, unanimously set aside Johnson's conviction on the conspiracy to defraud the United States count as violative of the free speech and debate clause.⁷⁹ Since the extensive inquiry which the government had improperly made into the authorship, motivation, contents and accuracy of Johnson's speech on the floor of the House of Representatives had, in the opinion of the court of appeals, prejudicially affected all of the charges against Johnson, the court remanded the case against Johnson for a new trial on the conflict of interest charges. The judgments of the two other defendants, non-members of Congress, were affirmed.

The *Johnson* case was brought before the United States Supreme Court by the federal government which was granted a writ of certiorari while the government reserved the right in its petition to argue against a new trial for Johnson on the conflict of interest charges, it did not so argue before the United States Supreme Court and instead in its oral argument rested its appeal solely upon its position with reference to the conspiracy count.⁸⁰ Accordingly, Justice Harlan, speaking for the majority, specifically declined to review the court of appeals' assessment of the trial record with respect to the conflict of interest charges. The Supreme Court did recognize, however, that while the court of appeals' decision could be interpreted as dismissing the conspiracy count in its entirety, it did not preclude the possibility that, since the making of the speech was only a part of the original conspiracy charge, the government could bring the conspiracy charge based on evidence other than the congressional speech and thus have a valid conspiracy count "wholly purged of elements offensive to the Speech or Debate Clause."⁸¹ The Supreme Court affirmed the judgment of the court of appeals

⁷⁹ *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964).

⁸⁰ The government reserved the right to contest the order of a new trial, but with the sole exception of a footnote in its reply brief, did not argue against a new trial. On the contrary, in oral argument, it gave up its adverse position in this regard and chose to rest its case exclusively on its position with respect to the conspiracy count—a fact which Chief Justice Warren, in an opinion joined in by Justices Douglas and Brennan, concurring in part, and dissenting in part, pointedly expressed "some surprise that the Government almost abandoned these issues when in this Court. . . ." 383 U.S. at 187 n.1.

⁸¹ *Id.* at 185.

and remanded Johnson's case to the district court for further proceedings consistent with its opinion.⁸²

In its decision, the Court said:

The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy thereby depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. . . . We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.⁸³

After reviewing English and American history of the doctrine of legislative privilege, the Court recognized that the doctrine did not emerge out of a desire to prevent possible court action, "but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."⁸⁴ The Court continued:

There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.⁸⁵

In holding that a criminal prosecution of a congressman which was dependent upon inquiries into the contents and motives of a speech delivered on the floor of the House of Representatives violated the speech and debate clause, the Court explicitly refused to broaden its decision to include two specific classes of cases. The Court observed that its decision did not apply: 1.) to a prosecution founded on a general criminal statute which does not draw into question any legislative acts of a defendant legislator or does not

⁸² The remanded *Johnson* case was retried in the fall of 1967. The outcome is not as yet known.

⁸³ 383 U.S. at 177.

⁸⁴ *Id.* at 181.

⁸⁵ *Id.* at 182.

question in any way his motives for performing them; and 2.) to a prosecution which, although possibly involving inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.⁸⁶

In reflecting upon many of the still unanswered questions as to the scope and limits of the application of the doctrine of legislative privilege, one fact becomes apparent. Much of the ambiguity and vagueness which still exists in the decisions not only reflects the Court's cautious enunciation of the doctrine based on the specifics of a fairly limited number of cases coming before it in this area, but also reflects the lack of a proper appreciation and understanding of the nature and techniques of the operation of the legislative process in a modern industrial society.

If the doctrine of legislative privilege is to perform its traditional function in our system of separation of powers of permitting legislators to carry out their increasingly onerous responsibilities without fear of prosecution or harassment from the executive and judicial branches, then it must be applied broadly and liberally to effectuate its intended purpose. In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded or, for that matter, even fifty years ago.

Modern legislatures have had to adopt their techniques of operation to the increasingly complex society within which they must function. New techniques and new methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain static if it is to remain meaningful. It, too, must evolve. It must develop in its application to the facts of modern legislative life. It must demonstrate in its application that it is still capable of providing present day legislators with an immunity from prosecution for the kinds of activities in which legislators must engage if they are to hope to discharge their duties in a responsible and effective manner.

In considering the present status of the law with respect to the doctrine of legislative privilege, it can be seen that certain propositions have become firmly established: 1.) the doctrine of legislative privilege should be broadly construed and liberally interpreted in

⁸⁶ *Id.* at 185.

order to effectuate its purpose; 2.) the privilege applies to more than mere spoken words whether in speech or debate. It also applies to written reports, resolutions, and voting as well as other acts done within the sphere of legislative activity; and 3.) the privilege is not confined merely to the four walls of the legislative chamber. It can apply to official legislative duties which are carried on outside of the geographical or physical area of the legislative chamber.

While the Court specifically reserved for future decision on appropriate facts the issue of whether a legislator may be prosecuted under a general criminal statute, which does not involve any legislative acts or does not in any way involve an inquiry into his motives for performing them, it would be surprising indeed if the Court did not ultimately hold when an appropriate case is presented that such a prosecution is completely permissible and that privilege does not apply. A legislator, after all, is merely another citizen when he is not engaged in any way in his legislative activities. If at such times he violates a general criminal statute, he should be held to answer for his violation in the same manner as any other citizen. It would be ludicrous to argue that a legislator who drives his motor vehicle through a red light, or is apprehended speeding on the highway, or participates in an armed robbery of a bank, or commits a murder, is entitled to the claim of privilege. In interpreting and applying the doctrine of legislative privilege, it is clear that an official conduct or official duties test must be used as a necessary condition precedent to the claim of privilege. But it is here contended that the scope and dimensions of such official conduct or duties must be sufficiently broad to embrace all of the wide varieties of activities in which modern legislators currently engage as a legitimate, desirable and indispensable part of their legislative responsibilities.

To define the privilege in the broadest possible terms consonant with the realities of the conduct and operation of the modern legislative process is not to suggest that innumerable practical difficulties in the application of the doctrine of legislative privilege would not still remain. These difficulties are likely to be even more acute in states such as Massachusetts where the constitutional phrasing is cast in broader terms than speech and debate. It would be incongruous to assert that the use of the word "deliberation" in the Massachusetts Constitution adds nothing more to the privilege than is contained, for example, in the United States Constitution. Yet what precisely does "deliberation" mean? How much more of legislative language and conduct is brought under the protective umbrella

of privilege by its use? Does it merely import the formal proceedings of the legislature? Or does it connote, instead, the act of weighing, pondering, discussing or otherwise considering the arguments and the underlying facts for or against a particular course of legislative action even apart from the formal proceedings of the body itself?

In its broadest sense, if a legislator is to be given the freedom to deliberate, every relevant thought, word or deed which precedes the final determination of a legislative course of action by any member of the legislature must be regarded as part of the deliberative process in the legislature on that particular matter. A legislator engaged in conscientious deliberation on a matter must be free to go anywhere, talk or listen to anyone, examine and investigate for himself at any time and in any place, anyone that may be of some assistance, or that he thinks may be of some assistance to him, in the performance of his legislative duties. Deliberation is more than mere cogitation. In order to deliberate, facts must be weighed. The process of deliberation, therefore, must be held to include the ascertainment of those facts which are the *sine qua non* of the deliberative process. In their search for the facts, legislators must be permitted freedom of inquiry unhampered by the possibility that they may be called to account elsewhere for their fact-finding efforts as an essential part of the deliberative process.

But even where the privilege doctrine is more narrowly phrased in terms of speech and debate, innumerable practical difficulties in the application of the doctrine can readily be foreseen. Does the privilege extend to all of the language and actions of legislators serving on a legislative committee? What about legislative subcommittees? And what of a legislator, not specifically authorized or directed by any vote of the legislature, who conducts an inquiry of his own to acquire information to enable him to discharge his legislative duties in a proper manner?

Does the privilege doctrine, whatever its ultimate limits may be, apply only when the legislature itself is in session whether in the sense of formally meeting on a particular day or not having concluded its formal work for the particular year? Should it encompass the duties of a legislator engaged in investigation, study and consultation when the legislature in either sense of the term is not in session? Should it apply to the activities of a conscientious legislator who, even after the session is over for the particular year, en-

gages in investigation, study and consultation on proposed measures for the next session?

And what about the problem of legislative intervention before or mediation with executive or administrative departments, boards or agencies on behalf of a legislator's constituents? With the ever-increasing size and complexity of modern government at every level, the legislator's function of intervening or mediating to secure information, to expedite a decision or to endeavor to persuade governmental bureaucrats that some particular course of action or decision is necessary or desirable may well be one of the most significant functions a legislator performs in the execution of his duties. Certainly if it is carried out in a proper manner, it can be a most humanizing factor, a means of preserving democratic values and of keeping government close to the people by removing or lessening the inevitably abrasive impact of the large impersonal bureaucracy upon the lives of ordinary citizens. Should the doctrine of legislative privilege be held to apply to such intervention or mediation by legislators?

VI. THE LEGISLATURE AS A FORUM FOR CRIMINAL TRIAL

Throughout our consideration of the doctrine of legislative privilege, we have accepted an assumption which now needs to be critically examined. In asserting a broadly construed, liberally interpreted doctrine of legislative privilege, we have assumed that if the legislator was entitled to his claim of privilege and, thus, could not be held to answer or be tried in the courts, that he could and would be held accountable and be tried in the legislature.

It has never been our intention to suggest that legislative malefactors should go unpunished. The legislature is not a haven for criminals, a privileged sanctuary from which the venal, the corrupt and the unprincipled may engage with impunity in the most base depredations upon the public interest. The assertion of a broad legislative privilege is not for a moment the granting of a license to commit wrongdoing and go unpunished to members of the legislature as part of the trappings of legislative office.

What, then, can be said of the legislature as a forum for the trial of its members, particularly for criminal acts? Generally speaking, most commentators and observers have taken a very dismal view of the legislature's suitability to conduct such trials. The learned Cooley, for example, in his *Constitutional Limitations*, observed:

Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode.⁸⁷

The late Dean Roscoe Pound, in carefully researching and evaluating what he called “examples of legislative justice,” concluded “it may be said without hesitation that in action it exhibits all the bad features of justice without law.”⁸⁸ Pound states, as reasons for his conclusion, that legislative justice 1.) is “unequal, uncertain, and capricious”; 2.) was often influenced by “personal solicitation, lobbying, and even corruption”; 3.) has always been “highly susceptible to the influence of passion and prejudice”; 4.) has often been affected by “the preponderance of purely partisan or political motives as grounds for decision”; and 5.) “has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments.”⁸⁹

A recent critical commentary on the issues raised in the *Johnson* case has continued these traditional arguments against the suitability of the legislature as a forum for criminal trials.⁹⁰ In arguing against the rationale of the court of appeals’ decision in the *Johnson* case, this commentator has observed that there is a natural reluctance on the part of the Congress to move against one of its own members because of the prevalence of a club spirit or attitude in

⁸⁷ 1 COOLEY, CONSTITUTIONAL LIMITATIONS at 536–37 (8th ed. 1927).

⁸⁸ Pound, *Justice According to Law Part II*, 14 COLUM. L. REV. 7 (1914).

⁸⁹ *Id.* at 7–11. In this and the preceding quotation cited in note 86 above, it is important to point out that neither Cooley nor Pound is talking specifically about legislative trials of members of the legislature. Instead, both are dealing with bills of attainder directed specifically at non-legislators.

⁹⁰ See Sisitsky, *supra* note 42. I am deeply indebted to the author of this significant note which was cited by the United States Supreme Court in its *Johnson* decision, especially for his collection of relevant cases and sources. My disagreements with Sisitsky’s general acceptance of the traditionalist position that the legislature is not a suitable forum for criminal trial, his belief that the court of appeals erred in its *Johnson* decision, and his conviction that Congress can and should delegate its power to deal with the wrongdoing of its own members to the courts under carefully defined statutes setting forth the specific offenses with precision, as well as my disagreements on many other lesser points, do not detract from the gratitude and appreciation which I owe to this author for his thought provoking analysis of the major issues.

the Congress; that a court trial at least affords an accused congressman the benefits of constitutional safeguards and guarantees which he is not likely to receive in a legislative trial; and that any legislative effort to discipline its members or apply sanctions to its members will always be attended by an inevitable political coloration.

It must be conceded that critics of the legislature as a forum for the criminal trial of its members have made some very effective points.⁹¹ Undoubtedly, the inherent difficulties which these critics deem to be endemic in the legislative situation have posed many grave problems for serious students of criminal and constitutional law. Underlying much of the opposition to legislatively imposed sanctions as a method of dealing with legislative wrongdoing is the implicit belief that the legislature cannot or will not act to deal effectively with wrongdoing and to punish the wrongdoer.⁹²

American experience with the application of sanctions by the legislature to offending legislators tends to lend much credence to the critics' point of view that the legislature has been slow to move, reluctant to find wrongdoing and relatively lenient in its punishments and sanctions.⁹³ While Thomas Jefferson, for example, believed, in accordance with English precedents, that the Congress had full power to imprison its own members, no member of Congress

⁹¹ See Sisitsky, *supra* note 42 at 348-49; See also Thomas, *supra* note 56 at 84-85. One must first remember that the House is not a court; the determinate factors in its decisions will not necessarily coincide with those that a court might use. It is also important to note that there is no regular House procedure for trying its members. Previous House decisions in similar cases are not binding. There being no generally held standards for punishment of a member, the Congressman may vote on the motion of contempt on one of several different bases: (a) belief in the accused's guilt of the charge made; (b) social, political, and ideological quarrels of all kinds; (c) party loyalty and directives. Without generally held standards, or even a method of reaching standards for a particular case, it is doubly difficult to judge the wrong or punish.

⁹² See Thomas, *supra* note 56 at 80.

Implicit in these attacks on privilege is an objection on another level—one seldom fully articulated. The objection is the belief that a Congressman shielded by privilege will never be held accountable for actions that in the case of the ordinary citizen would be legally punishable. Perhaps one of the reasons for the non-articulation of this concept is that it is, in effect, a direct attack on Congressional responsibility itself. It must be remembered that *Johnson* does not settle the substantive issue of Representative Johnson's involvement in the bribery conspiracy; it only holds that the courts do not have jurisdiction over the offense. No doubt this result is much easier to reach because there is such jurisdiction within the House itself. However, it is the effectiveness of that jurisdiction which probably underlies the bulk of the criticism of the privilege.

⁹³ *Id.* at 80-81; See also Sisitsky *supra* note 42 at 349 n.84-86.

has ever been imprisoned by Congress and even expulsions from Congress have been relatively rare.⁹⁴ Indeed it cannot be effectively argued that the United States Congress or American state legislatures generally have heeded the admonitions or lived up to the hopes of the courts in such sentiments as, for example, were expressed in *Cochran v. Couzens* where the Court of Appeals for the District of Columbia said: "Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues. Article I, § 5."⁹⁵

But while the difficulties of legislative trials of its members are numerous and real, and while the reliance upon legislative sanctions as an exclusive means of dealing with legislative offenses would undoubtedly mean that in some instances members would go unpunished or would be punished in a relatively lenient manner, it may well be the necessary price that must be paid for securing the obvious benefits of the doctrine of legislative privilege under our system of separation of powers.

In construing the nature and scope of the doctrine of legislative privilege, the United States Supreme Court has intimated from time to time that there may well be some extreme limits to its willingness to recognize a claim of privilege. In *Kilbourn v. Thompson*, for example, the Court said:

If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.⁹⁶

But with the exception of such intimations about extreme and highly unlikely legislative behavior, the United States Supreme Court has construed the doctrine of legislative privilege in virtually absolutist terms. If the privilege is to be properly construed so as to remain absolute in fact and not merely in form, it is manifest that the legislature must recognize its essential constitutional re-

⁹⁴ See Thomas *supra* note 56 at 80-81, 84.

⁹⁵ 42 F.2d 783, 784 (D.C. Cir. 1930).

⁹⁶ 103 U.S. 168, 204-05 (1880).

sponsibilities for dealing swiftly, effectively and justly with legislators who commit criminal acts during the execution of their official duties or on matters related to their legislative conduct and official duties. None of the inherent difficulties alluded to by the critics need be insurmountable. Undoubtedly, the widespread acceptance of the legislature as the exclusive tribunal for the trial of legislative members for criminal misbehavior and misconduct would greatly assist in overcoming many, if not all of the inherent difficulties in legislative trials. When it becomes clearly recognized and popularly accepted that unless the legislature acts to discharge its exclusive constitutional responsibilities, legislative malefactors will not be held answerable anywhere for their legislative misadventures and misdeeds, then, and perhaps only then, will the pressure to develop its techniques, procedures and resources for conducting legislative trials produce meaningful legislative results. The assumption of full, complete, absolute and exclusive jurisdiction to try its own members for legislative wrongdoing is an essential pre-requisite to the responsible discharge of the duty of the legislature to deal effectively with transgressions by legislators which is the inevitable logical consequence of the assertion of a broad and liberal legislative privilege.

If this analysis is valid in suggesting that a virtually absolute privilege requires a virtually exclusive forum for the proper handling and correction of its abuses, then the question arises: must the legislature deal with all legislative wrongdoing itself or may it constitutionally delegate its power to try and punish its own members to the courts? The United States Supreme Court specifically left this important question open in its decision in the *Johnson* case. But the clear and irrefutable logic of its decision leads to the inescapable conclusion that Congress must in some way deal with these problems itself and cannot constitutionally delegate away its exclusive jurisdiction to regulate the legislative conduct of its members. Such a conclusion obviously has deep, far-reaching consequences. Not the least significant of these consequences may well be the probable unconstitutionality of conflict of interest statutes as applied to the intervention or mediation aspect of the modern legislative function.⁹⁷

⁹⁷ It is not possible within the confines of this article on the doctrine of legislative privilege to examine in detail the case for the unconstitutionality of conflict-of-interest statutes as applied to legislators. In general, however, it may well be that the emergent doctrine of legislative privilege, whose full implications have as yet been insufficiently appreciated, may also bar such prosecutions in the courts. If the

VII. CONCLUSION

The doctrine of legislative privilege of freedom of speech and debate as a bar to criminal prosecutions in the courts is certain to be raised with increasing frequency both at the federal and state level. The ambiguities and unanswered questions which exist in this important area of the law are attributable not only to the paucity of decisions dealing with the application of the doctrine, but also to the broadened scope and the increasingly complex nature of the modern legislative process. If the doctrine of legislative privilege is to perform its essential historical function of eliminating the fear of the instigation and trial of charges by a hostile executive and judicial branch, thus providing for the free and untrammelled discharge of legislative duties, then it must be broadly construed and interpreted, and liberally applied to the realities of the opera-

legislature is held to be the exclusive forum for the trial and punishment of its own members for legislative misconduct and misbehavior, then serious questions exist as to the ability of the legislature to delegate to others its power to try and punish its own members, regardless of how precisely it may endeavor to define the specific nature of the offense. Privilege, moreover, as we have seen, inheres in the individual legislator and not in the collective body. It cannot, therefore, be delegated away. If a legislator is entitled to his claim of privilege, he is entitled to it even in the face of conflict with a general statute passed by the legislature in pursuance of an asserted power to regulate the conduct of its own members. While the power to regulate the legislative conduct of its own members clearly exists, this power does not and should not extend constitutionally to delegations of such power to either or both of the other branches of government.

The lines of judicial evolution, and the public policy considerations which underlie the *Johnson* decision, clearly lead to this logical conclusion. Whether the Court will follow the inherent logic of its decision in the *Johnson* case and proceed to erect a comprehensive prohibition against criminal prosecutions for all legislative actions remains to be seen. But the recognition by Chief Justice Warren and Justices Douglas and Brennan in their separate opinion in the *Johnson* case that the conflict of interest charges in that case raise "important questions," and that the Court has not had occasion to deal with such charges raised against a member of Congress since 1906 in *Burton v. United States*, 202 U.S. 344, strongly suggests that the Court may be preparing to move in this direction. If it does, it will, of course, overturn such cases as *Burton* and *May v. United States*, 175 F. 2d 994, (D.C. Cir. 1949), where a lower court held that a criminal prosecution of a congressman was valid where May, the Chairman of the House Armed Services Committee, was found to have accepted compensation to intervene before the War Department in order to secure contracts for his patron.

In the *May* case, the court said:

So, if a Congressman receives compensations for services rendered by him to a person in relation to any matter in which the United States is interested, before any Government department, he is guilty of violating the statute, even though the service rendered was a proper act on his part. A Congressman cannot legally receive compensation from a private person for doing his duty in respect to something in which that person and the United States have interests. The gist of the offense is the receipt of compensation. . . . *Id.* at 1006.

tion and conduct of a modern legislative system. In so doing, the courts must develop a comprehensive prohibition against the criminal prosecution of legislators for their legislative activities, including their intervention before or mediation with executive or administrative boards, agencies or departments. The legislature must come to be recognized as the exclusive forum for the trial and punishment of its wrongdoing members. Whatever inherent difficulties or obstacles may exist to the acceptance of the legislature as a suitable place of trial must be overcome by the development within legislative bodies of the resources, techniques and procedures for the orderly, efficient and just trial and punishment of offending members.

In the final analysis, no task is likely to be more important to the preservation and ultimate vitality of our governmental system of separation of powers than the widespread popular acceptance of the doctrine of legislative privilege in its most unwavering, pristine and absolutist terms.

Chairman METCALF. I was impressed by your reading of President Wilson's very important statement—the comments of a great scholar who was also a great President—and I was impressed by the absence of a parallel between that brilliant comment by President Wilson and the comment made by President Nixon when he sent the 1974 budget to the Congress, when he suggested that Members of Congress represent only special interests, and he is the only man who represents all of the people of the United States.

I think that you have very ably pointed out the difference between President Wilson and President Nixon's attitudes toward this branch of the Government of the United States.

I am going to ask you some more questions, but I know that our very newest member of the committee has some things to talk to you about, and so I am going to recognize Senator Helms.

Senator HELMS. Let me yield to you, sir.

Chairman METCALF. Do you have some suggestions or questions, Senator Gravel?

Senator GRAVEL. No, I don't, except to compliment you Professor, in coming forward and adding a dimension that I had not thought of—the informing function and this ombudsman idea. Do you have anything prepared?

Mr. CELLA. I have a prepared statement which is entered—

Senator GRAVEL. I would like to see this idea incorporated, Mr. Chairman, in the legislation we develop. I think he has done a little better thinking than we have in that regard.

Mr. CELLA. I would like to say, Senator, just so the record may be clear, I notice that in your definition of legislative activity, and in the definition in Senator Ervin's bill, you do not include the so-called mediating or intervening function. This is not at all surprising. This is not a development of the recent court in the two cases.

Senator GRAVEL. Do you know the reason? I think we are ashamed of that function. I think we are ashamed, when we have a constituent in our office, we think we are doing something illegal. I really do. I have had that emotion, and I am sure other Members have. When we have a constituent there, particularly the more or less wealthier constituents—they have the bigger problems—we expect contributions from them. So we make the necessary introductions or try to mitigate their problems to some degree. And we are angry if the contribution does not come.

I think backing that up into our moral perception, we feel there is a latent subconscious immorality there.

Mr. CELLA. I think, if I may address myself to this very briefly, I think I can understand that attitude. I served in a legislative body for 4 years and I know that we had nowhere near the staff facilities you have, in fact, we were entirely on our own, and in order to do our errands or service our constituents, it got to be a great chore and very damaging and many of us were not entirely happy with it. Many of us had the same trepidations you had from time to time. Somehow it was a murky area. We were never quite at ease in working in it. So while we did what we thought we had to do for political reasons for servicing our constituents, giving the kind of service we thought they were entitled to receive, we never particularly supported from the rooftops this type of activity.

It seems to me the more I reflect upon it in later years oftentimes critics of the legislative process, of course, will try to demean this function, and so the Court is in a grand tradition in a sense using the very terminology, the errand boy. You know, no Member of the Congress likes to consider himself as an individual purely and simply an errand boy. This is perhaps the lowest common denominator of human activity, merely the running of errands for others.

The mere fact that the Court saw fit to use this demeaning and disparaging language in describing what the Congress does in attempting to service, provide service, for its constituents, I think is in this grand tradition of political scientists and others who have disparaged this part of the function and, obviously, also that people such as Prof. Walter Gellhorn and others who have studied the ombudsman ideas in other countries, and who have advocated in one form or another that we ought to adopt something comparable. If we had an ombudsman, somehow the legislator could then escape or eliminate the necessity for dealing with these kind of activities. You can transfer them to the ombudsman, to the office of the ombudsman, and he would perform them and, therefore, the Congress would have more time presumably to devote to other purely legislative activities.

In my judgment, the thing that is overlooked entirely and completely by the Court is that there is a legitimate, purely legislative purpose served oftentimes by the Congressman who undertakes to answer the constituent's complaints, and to contact the appropriate agencies to try to get to the root of the problem and try to get it resolved, if at all possible, to have the discretion of the law exercised on behalf of the constituent. This really brings the Congressman, perhaps for the first time into direct contact with the operation of the bureaucracy and the way in which the laws which the Congress has passed are being administered. This may show, for example, that there is maladministration, that Congress never intended the law to be administered this way.

Oftentimes you can find things out for the first time through servicing the constituent, and you can then undertake to straighten out the situation in appropriations hearings and in other matters to try to get the law properly enforced, properly administered.

At the same time you will discover in servicing constituents, in this way, answering, responding to constituent complaints, dealing with the Federal agencies, you will discover again for the first time that perhaps the law is deficient in certain areas, that situations which you might have thought were covered, really were not covered and ought to be covered and this may lead you to seek an amendment to the law.

Now, I don't think that it is fair, although the critics of this function constantly seek to do this, and their demeaning and disparaging language as carried forth in the Court's decision, the errands the Congress performs merely being done because you want to ingratiate yourself politically, or the constituents expect this. I think you can argue quite convincingly that in any properly functioning legislative system, in a modern complex highly bureaucratic society, this is an indispensable function to the Congressman, a vital part of the legislative process to be able to find out in these ways how the laws are being administered and carried out that he has helped to pass. For

that reason, I would have no hesitancy in trying to put in a broad definition of legislative activity, the mediating function.

I am frank to say also this is an area where undoubtedly Congressmen in the past have gotten into considerable difficulty. This is the area where the temptations to bribery and corruption obviously, are ever present. And I am not for a moment condoning misuses of this mediating or intervening function. I don't think, for example, that it is proper for a Congressman to try to browbeat an executive official on behalf of the constituents to get something other than the law entitles him to have. That is a misuse of this mediating or intervening function. If it occurs and it is called to the attention of the Congress, it seems to me that Congress should act to discipline and punish that Member who has violated his public trust in this way.

Obviously, it is not proper either to hold yourself out as some Congressmen have done in the past and to collect fees from private citizens or private groups for intervening on behalf—on their behalf before the Government agencies. You get into the area of bribery and corruption and all criminal activity, and where that occurs that ought not to be condoned within the Congress. That is not within the ambit of this legislative mediating or intervening on behalf of the constituent and ought to be effectively dealt with by the Congress in disciplining and punishing its own Members.

It is a corollary of what I have said, inevitably, that if the Congress is going to argue for absolute immunity as I would be prepared to argue, but I recognize there are political difficulties in this position. What Congressmen, for example, wants to vote to exempt themselves from the operations of a bribery statute or the conflict of interest statutes. This may not be a particularly popular or favorable posture for example to be in. It might lend itself to campaign oratory by an opponent. Here is a fellow that thinks he is above the laws. I recognize the political problems involved. Perhaps, realistically, Congress cannot go as far as I would like to see it go in these areas. The fact of the matter is, whether Congress goes as far as I would like to see it go, or stops somewhat short of a broad, liberal construction of the speech or debate clause in its immunity, in any event, it is going to be necessary for Congress to develop to a greater extent than it has in the past procedures, techniques, sensitivity to the necessity for dealing with its own Members who violate their public faith.

Representative BROOKS. Mr. Chairman.

Chairman METCALF. Congressman Brooks.

Representative BROOKS. I appreciate your coming down this morning. We enjoyed your testimony and your early adherence to freedom for Members of Congress even before it came into such prominence by the Supreme Court rule. I particularly like your statement on page 10 your urging:

Anything less than absolute unyielding privilege, broadly and liberally construed, is of little value in preserving the independence of the legislative branch and the separation of powers generally.

Anything less than that is pretty worthless.

I appreciate your help and we have, I know, a member of the Justice Department and a distinguished Member of Congress coming, and I would defer any other questions.

I would thank you, Mr. Chairman, for the opportunity.

Chairman METCALF. I know we have other witnesses today, Congressman Brooks, but I think with this witness we should underscore some of the testimony that he has made so ably and so brilliantly today.

I would like to have you tell me where there is in the Constitution any immunity for the judiciary?

Mr. CELLA. I cannot off the top of my head. My impression is there is none.

Chairman METCALF. Or for the executive department?

Mr. CELLA. None whatsoever, either, sir.

Chairman METCALF. So we have in the Constitution the first amendment which is a basis for immunity for the news gathering sources, and we have this so-called speech and debate clause—clause 6 of article I—which is immunity for the legislative branch, but we have no propositions for immunity for the judicial branch. Yet they have an immunity, they have asserted it, and they have found it in some historical tradition. Isn't that correct?

Mr. CELLA. That is correct, and I think historical tradition and in the operation of the system of separation of powers.

Chairman METCALF. And I don't see how a judge could function without such immunity, but there isn't anything in the Constitution—as I recall the Constitution—and I read it recently, or in the federalist papers or all the decisions that have come down, that specifically cites a clause for judicial immunity.

Now, since we have been able to find immunity for the judicial branch, whether it is in the Constitution or not, I want you to reemphasize, is it or is it not your opinion that Congress can pass rules, joint resolutions or legislation defining legislative activity?

Mr. CELLA. Senator, in my judgment, Congress has the right first of all to enact criminal laws.

Chairman METCALF. Let's talk about criminal law. There isn't any criminal law in the Federal system except that enacted by the Congress of the United States.

Mr. CELLA. There is no common law.

Chairman METCALF. Isn't that a basic proposition?

Mr. CELLA. No Federal common law of criminal activity, that is correct.

Chairman METCALF. We have several classic cases that are all in the case books where somebody has left out a certain specific statute and someone escaped punishment because there wasn't any common criminal law.

Mr. CELLA. That is correct.

Chairman METCALF. So Congress has a right to define what is or is not a crime, whether it is that of a Congressman or that of an alien, isn't that right?

Mr. CELLA. That is correct.

Chairman METCALF. Which also brings up a proposition that while the Supreme Court in the *Brewster* and *Gravel* cases rather circumscribed what they thought was the constitutional immunity, the Court did point to statutes and based some of its decisions and some of its conclusions upon interpretation of statutes that were passed by the Congress and the rules of our respective bodies.

Now, you and I have appeared before the courts and argued cases and read decisions and frequently don't you find that in some of these cases there is an invitation on the part of the Court to change a statute if you don't agree with the decision or interpretation that the Court has made?

Mr. CELLA. This is true, Senator. The only thing that troubles me about that, I don't now how much of an invitation this Court was giving in *Brewster* to the Congress. It seems to me in a sense, I may be misreading and misinterpreting the attitude of the Court, it seems to me as I read that section, talking about the possibility of the Congress might if it wished to do exempt its members from the operation of the bribery statutes, it seems to me the Court was almost saying, "Well, you fellows can do this, if you will, you really don't intend to do it because of the obviously political consequences."

Chairman METCALF. That may be correct. Congress can do that.

Mr. CELLA. No question about that.

Chairman METCALF. I would be a little more sanguine about the interpretation if Congress would do that. But, this business of saying, even though the Founding Fathers felt it necessary to protect the legislative process, that you can't add or amplify or explain some of the things that are in the Constitution, is inordinately restrictive. It seems to me to be a restriction that isn't in the first amendment, isn't in the 14th amendment, isn't in any of the basic provisions of the Constitution, and I hope that we will be able to arrive at a resolution of this that will not mean a critical confrontation with the Supreme Court or the executive branch.

Mr. CELLA. I say again, regarding Senator Ervin and Senator Gravel's bills, I don't see any problem with the Congress enacting that portion of Senator Gravel's bill or Senator Ervin's bill saying as far as the operation and functioning of the judiciary and the grand jury system is concerned, Congressmen or their aides may not be called before these bodies or questioned about legislative activity.

Chairman METCALF. And we who know say these are legislative activities?

Mr. CELLA. That is right. This is what you would be doing by enacting any of these bills certainly.

Chairman METCALF. And Justice Burger who has never served in the legislature as far as I know—

Mr. CELLA. Or any member of the present court.

Chairman METCALF [continuing]. Are not quite as equipped to ascertain just what legislative activities are than we are. But we have left a vacuum there, relying upon things that we thought were in the Constitution, that permitted the Court to come in and say these were not legislative activities unless Congress says so.

Well, I think this is a very important dialogue and I would like to continue with you, but we do have two other witnesses—

Senator HELMS. Mr. Chairman, could I have a moment, out of my respect to my senior members of the committee, I deferred my questions.

Let me thank you for a fascinating presentation this morning. I was just wondering, as I sat here, as the newest member of this committee, listening to you, what you are going to do with the fellow like me who doesn't want any rights or immunities beyond what now exist?

I want to understand precisely your position.

You mentioned, for example, activities of Congressmen heretofore believed to be protected; the implication—at least my inference being—that such activities are now under fire; second point, you mentioned responsibilities of Congressmen in serving constituents not directly related to legislation and third, I would want to raise a question, would there be any validity to raising the question of whether Congress has strayed too far from its original constitutional role in terms of what Congressmen and Senators now feel that they should and must do.

You mentioned, for example, getting Government contracts for constituents, making appointments with the executive branch for constituents, solving problems of private citizens, press releases and other at least quasi-political functions. I just wonder if there is something to be said for perhaps the Congress backing off and looking at the role of Government in the broad sense, to determine whether perhaps Government has gone and grown beyond the original constitutional concept.

Do you have any opinion about that?

Mr. CELLA. I think you are quite right in emphasizing, Senator, that Government has grown beyond the original—Government has grown beyond the conception of Government at the time of the Founding Fathers.

Now, and this is really in many ways, Senator, the essence of the problem. I suppose, because what has happened as I see it, is that there in the 18th century a constitutional document was put together which has stood the test of time and which all of us would agree was fundamentally sound in its infinite wisdom in many of its major provisions.

This document established at that time, is now servicing a country which has grown enormously in this period in a governmental structure which obviously is far beyond anything that could have been conceived of by the Founding Fathers.

Senator HELMS. Parkinson's law is perhaps playing a role in that?

Mr. CELLA. There is a bit of truth in that.

I do think, however, Senator, that the problem as I see it is that in attempting to apply these constitutional provisions and to evolve procedures for implementing these constitutional provisions, consistent with the growth in Government, and I think whether we could argue whether Government ought to be into more areas or less areas, in what areas precisely Government ought to be involved, or ought not to be involved, these would be matters of political philosophy and judgment, but all of us would agree that modern Government is vastly different from the kind of Government that existed back at the time of the Founding Fathers in the development of the Constitution.

Senator HELMS. You will agree there are few Members of Congress who go around advocating less government for the people?

Mr. CELLA. Well, I suppose this is true. There are some very strong, vibrant, healthy conservatives who still would like to see Government reduced and they serve a very useful purpose.

Senator HELMS. I appreciate that, sir.

Let me move on to another thing.

I know the chairman wishes to have other witnesses.

If Congressmen were to be made immune from prosecution, as you contend ideally should be the case, let's take bribery, for example,

what would be the people's recourse—or do the people now in your judgment even deserve recourse?

Mr. CELLA. I think, Senator, I think there would be two recourses. First of all, the people always in the course of any election of Congressman, Senator or Member of the House, always, of course, have the ultimate recourse of the ballot box. You have a Congressman, and I think Senator Gravel suggested a little earlier, that there was a Member of Congress who apparently was receiving moneys from a company for apparently not performing any observable service. This got to be known among his constituents and he was voted out.

Senator HELMS. Should that be the end of it?

Mr. CELLA. That is the ultimate answer in a sense. The people are always there with the power of the ballot box, if they know, if they have the information, and feel strongly about it, obviously they are in a position to retire such an individual. That is your ultimate recourse. It seems to me, however, that the Congress has responsibility long before you get to this ultimate recourse of the people themselves, actually. It seems to me the Congress must be sensitive to this problem and the Congress, if you are going to have any kind of absolute immunity, or anything approximating it, or even if you are attempting to move in minimal ways to get greater legislative immunity than is provided for in these recent decisions, it seems to me, necessarily it follows, that the Congress must itself be sensitive to the problem of disciplining and punishing its own Members. It must demonstrate greater sensitivity than in the past. I know you have the ethics committee and there are other committees. I am not really in a position to comment on the effectiveness of these committees. I haven't really studied them very carefully. It seems to me somehow there has got to be a mechanism devised in the Congress. I think the worst thing in the world from anybody's point of view, from, I imagine, of the Congress, the point of view of the overwhelming majority of the Members of the Congress who never get involved in these situations, bribery, corruption, who are highly ethical, concerned with doing their jobs, the worst thing in the world from the point of view of all of these people is to permit legislative activity of an unacceptable nature, legislative activity of an improper nature to go unpunished.

Senator HELMS. As I understand, you are suggesting only that a Congressman or Senator suffer the punishment of loss of his job. You don't imagine that Congressmen would send one of their own members to jail, do you?

Mr. CELLA. That has never arisen, to my knowledge.

Senator HELMS. You could be opening a Pandora's box there, right?

Mr. CELLA. I would be prepared to argue that Congress could do this. You know that Congress, for example, prior to the adoption, for example, in 1873 of the contempt statutes which is now the commonly used procedure for dealing with contempt; namely, turn it over to the Justice Department, Attorney General of the District of Columbia, proceeding under title 2, sections 191 to 195 of the United States Code prior to the adoption of this in 1873 of course Congress did deal with those, not Members of the Congress, but those citizens who ran afoul, who were contemptuous of the Congress, who refused to cooperate with the committees, or refused to appear and Congress in those days

did under the aegis of the Sergeant at Arms, incarcerate members of the public who were contemptuous.

Senator HELMS. I am not being argumentative. I want to understand your position.

Let me ask you this question:

Were the Pentagon papers stolen documents, in your view?

Mr. CELLA. Senator, let me say very frankly, if I may on this question. It is not for Senator Gravel, it is not because of his presence on this committee, all I can say with certainty and I can't really give you a direct answer. I am not really—am not that informed in my position to be able to make a judgment honestly in answer to your question directly.

It seems to me, I can say this, if Senator Gravel did anything which in the judgment of his colleagues in the Congress was improper—

Senator HELMS. I wasn't referring to Senator Gravel. I was referring to Mr. Ellsberg.

Mr. CELLA. I would say, Senator, generally, this is an issue which is currently before the courts—

Senator HELMS. I accept that as your answer. Let me state a hypothetical case.

Suppose a thief, a former employee entered the office of, say, the distinguished Senator Gravel and made photostats of documents which the Senator for whatever reason satisfactory to him, wished to regard as confidential, even though these documents may well have related to public matters, then let's suppose that these copies of the Senator's documents were turned over to someone in the executive branch and a representative of the President, however far down the line of the level of the echelon of the bureaucracy, decided to release the information?

Now, would you say that the President's representative should be able to do this with immunity and impunity? Would the shoe fit both ways, or is this a one-way street?

Mr. CELLA. I would say, Senator, and here I suppose I depart from testimony I heard from Senator Gravel this morning, this is just on general principles of the operation of doctrine of the separation of powers, there ought to be a recognizable area of executive privilege.

I don't think it is at all as far-reaching—I don't think it has a historical basis or constitutional basis as yet, I would root this privilege in the doctrine of separation of powers, I don't quite know how far this goes. I am not that familiar with all the intricacies of executive privilege to draw the line precisely.

I have the impression that the claims of the Chief Executive at the present time are far beyond what executive privilege probably should mean, but I do recognize there ought to be legitimate areas of executive privilege.

Senator HELMS. I was referring to the acquisition of documents, hypothetical documents, and I don't understand the contradictions that I hear relating to Watergate, for example. Please understand that I am totally opposed to bugging or breaking and entering and any other violation of the law.

I don't understand one set of rules for one side and another set of rules for that one.

I was interested in your opinion on that. I was hopeful you could clear it up for me.

Thank you very much, Doctor.

Mr. CELLA. Thank you, Senator.

Chairman METCALF. Congressman Dellenback, I know that you will read with a great deal of interest Mr. Cella's position this morning because it is an area in which you have some concern, and I think maybe at least he has touched upon some of the matters in which you are interested.

Representative DELLENBACK. I appreciate that, Mr. Chairman.

I regret we have had before our Interior Committee on which I serve, a bill of considerable importance to Oregon and we have just finished acting on it and voting it out fairly, and we hope the Senate will move it with expedition through as soon as we get it through the floor of the House.

Chairman METCALF. As a member of the Senate Interior Committee, I will give it every expeditious dispatch as possible.

Senator GRAVEL. I would like to pursue something. I just think we have a very unusual person here with us, and I think we have got some interesting concepts, and that is the one advanced by my colleague.

Suppose there is a theft of papers that show malfeasance in office, and you have that information to use. Maybe it is the executive that has it on a Member of Congress or maybe it is the Congress that has it on a member of the executive. Should the information not be used because of the nature of the acquisition, if it shows wrong?

Should I, if I acquired that which shows something wrong, because of how it was acquired—maybe I acquired it illegally—should I then after I read it, close my mind to that information and go on with my life? What are the legal ramifications of that?

Mr. CELLA. I am not sure I can answer all the legal ramifications. I would like to take a brief stab at it.

It seems to me, obviously, every public official that takes an oath to uphold the Constitution, the laws of the country, if evidence comes into his possession, regardless of how he may acquire that evidence which indicates malfeasance in public office, I cannot believe that he then has an obligation merely to sit there and do nothing about it.

It seems to me that depending upon where he sits either on the executive branch or legislative branch, there ought to be appropriate means available to him to further pursue this. If it is a Member of Congress, I suppose, for example, he can undertake or attempt to get some kind of an investigation started of the department or agency involved.

If it is an executive branch official, I suppose his proper role really is—if it is an executive branch official with information about a Member of Congress, I suppose that at the present time where there are general criminal statutes applicable to Congress, then it is his obligation to report such information to appropriate law enforcement officers.

Senator GRAVEL. If this includes wiretapping, does this preclude—

Mr. CELLA. It may well preclude its introduction as evidence into the courts, but I think we are talking in terms about what he does with the information, does he have an obligation, or does he ignore it and pretend it never came to his attention. I think this would be highly improper for an executive official or congressional official.

If we were to get to a situation where we had something approximating the absolute immunity, that I think the Member of Congress ought to have—if you abolished bribery statutes, conflict of interest statutes as they applied to Congressmen, then it seems to me somebody in the executive branch would not be able to go to law enforcement officials. He would have to come to someone in Congress to attempt to persuade the Congress to deal with it.

Senator GRAVEL. Understanding as you do how the Congress works—it is a system of accommodation—we would not be prone to “rat” on each other. I use the word “rat” in quotes, meaning to discipline each other. It is a very hard thing to do. We are going to look across each other at the table. I may be mad at him, but I may need him, and I may not be too keen on going around and disciplining a chairman. Maybe it is unrealistic that we really could do that.

Mr. CELLA. In my opinion, I am well aware of the enormous problems in this area. I don’t mean to minimize them for a moment. I can’t imagine anything more unpleasant to any member of a legislative body than having come to his attention that one of his colleagues is violating his public trust and feeling he must take some action, and naturally his colleague in the Congress must act to discipline or punish that Member.

I think all of us would like to believe, all of us who serve or have served, are equally as dedicated to the public interest and the protection of public interest.

Senator GRAVEL. We have to chase all day long to serve the public interest. We don’t have to. We have options. If I know of a colleague doing something wrong, I can choose to make that my thing. But then I would have so many things I can focus on. So I let that go. I am sure most of our colleagues feel the same way about it.

Mr. CELLA. I don’t think the tendency is to that kind of thing. You are dependent upon each other and the good will and confidence and respect of each other. There is no desire on anyone’s part and yet it seems to me if you take this perspective, and you see the consequences to the operation of the system which are going to ensue from decisions such as *Gravel* and *Brewster* and from permitting this legislative political distinction, for example, to continue to operate, what are the alternatives? It seems the alternative to that is that Congress itself must police and discipline its own Members. I don’t minimize the difficulties involved. They are enormously difficult and enormously unpleasant.

It seems to me unless you are prepared to say, we will delegate away to someone else and thereby open the whole range of possibilities of hostile or unfriendly executives and judiciaries getting involved here, I think of necessity you must then come back to the position that the Congress itself has to develop the greater sensitivity to the necessity for dealing with its own Members. You can’t claim this absolute immunity to any extent and turn around in the next breath and say, on the other hand, for these kind of built-in reasons, we are not going to do anything to discipline these Members.

Senator GRAVEL. I don’t think history has recorded the great skill of Congress at disciplining itself.

Mr. CELLA. I don’t think that the record of the Congress is encouraging, although it is getting better, Senator.

Senator GRAVEL. It seems to fly against human nature. I think the system of letting things be known, as was in the case of the California situation, Technicolor, just the mere knowledge of it causes the constituency to discipline a Member.

Mr. CELLA. I don't think I am unrealistic in my opinion of this, I do have an appreciation of the problems and the historical——

Senator GRAVEL. Could I ask an imposition? If time permits, would you supply for the record a brief history of the evolution of the possible increase in the Congress' ability to discipline itself?

Would that be too much?

Mr. CELLA. Senator, time might best be served by my referring to one or two items that I know of dealing with this subject. The Committee on Rules and Administration of the Senate has compiled cases of election, expulsion and censure involving Members of that body. That compilation covers all cases between 1793 and 1972. I don't know of any comparable House document. I might also mention a recent law review article by associate professor Gerald McLaughlin of Fordham University Law School. That article, "Congressional Self-Discipline: The Power to Expel, to Exclude and to Punish," appeared in the October 1972 edition of the Fordham Law Review.

Senator GRAVEL. Do these materials back up the thesis you just made that we have been improving.

I would like to see where.

Mr. CELLA. Both these documents are more historical treatments of the congressional self-discipline role. While they may not show an improvement in the discharge of that role, they enumerate the instances where action has been taken. I am thinking particularly, I suppose, of the *Adam Clayton Powell* case. You did act. You could argue that you should have acted earlier or—I don't know, but there have been situations which the Congress——

Senator GRAVEL. The *Dodd* case.

Mr. CELLA. Yes. I think there is a growing awareness, at least I sense this, maybe I am wrong. I think you are a much better judge of the attitudes of your colleague. Logically it seems you have to have a greater awareness, or you are going to have to say, we are going to have to delegate to someone else the power to deal with our Members for any of their violations of public trust. I think that opens up a Pandora's box of undermining the independence of Congress.

Senator GRAVEL. Would you add that the someone else is the people?

Mr. CELLA. Ultimately, of course, it is the people. The people will vote out if they know, and I am confident the American public is not going to tolerate, it seems to me, the return to office of those whom they are sufficiently informed have violated their public trust.

Chairman METCALF. Thank you very much. We have kept you much too long. We have enjoyed your testimony and I know it is helpful to the committee and it will be helpful to the Congress when appropriate committees consider this important matter.

Mr. CELLA. Thank you very much, Senator, and the committee for their kindness and courtesy in listening to me this morning.

Chairman METCALF. We are going to try to get through Mr. Dixon and Congresswoman Mink will come back this afternoon, and in the meantime we will also hear from Congressman Curtis.

Representative DELLENBACK. Who will be the first witness?

Chairman METCALF. I think we will call Mrs. Mink, first. She was supposed to be a witness this morning and we didn't reach her.

Representative DELLENBACK. Two o'clock?

Chairman METCALF. Two o'clock, hopefully.

The next witness is Assistant Attorney General Dixon. Mr. Dixon has been a former professor of law at George Washington University; has been consultant on administration of Federal criminal laws and has been outstanding in law school, a member of Phi Beta Kappa. He has only been a member of this official position for 1 month, as I understand it, but has appeared at previous times before committees, I understand, Mr. Dixon, that you were consultant to some of the constitutional conventions of some of our sister States when they were under consideration.

So we welcome you here this morning as a spokesman for the Department of Justice and executive branch, Mr. Dixon.

The time is late. You very courteously and under the rules submitted your statement.

Would you mind submitting it for the record instead of reading it?

Mr. DIXON. I would be pleased to do that. I did not have in mind reading the entire statement anyway. Perhaps I could present it selectively.

Chairman METCALF. We will put your statement in the record and be glad to have you highlight it.

STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY MR. WARREN GRIMES, ATTORNEY-ADVISOR

PREPARED STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGAL COUNSEL

Mr. Chairman: I am pleased to have the opportunity to appear before this committee as a representative of the Department of Justice to discuss the current state of the law with respect to the congressional immunity granted by the speech or debate clause in article I, section 6 of the Constitution. The central thrust of the speech or debate clause is to insure that Members of Congress will express their views openly and vigorously in discharging their legislative functions, free from the threat of harassment by criminal prosecutions and civil proceedings. The clause may also have implications with respect to powers of congressional inquiry, including the gathering and dissemination of information concerning the operations of the Federal Government.

While the Supreme Court has given the speech or debate clause a relatively broad interpretation, the Court has also made it clear that the immunity granted by the clause does not extend to the furthest limits of its logic. Like other fundamental constitutional guarantees, including the first amendment's guarantee of free speech, the interests underlying the speech or debate clause must be balanced against weighty countervailing governmental or constitutionally protected private interests when these interests conflict. Moreover, the freedom granted to Members of Congress by the speech or debate clause frequently carries with it

immense responsibilities. During World War II, for example, a few Members of Congress had knowledge of the Manhattan project for development of the atomic bomb. Those Members kept that secret, not, we may be sure, because of any doubts about their immunity under the apparent scope of the speech or debate clause, but out of an acute sense of responsibility for the national interest.

I. CONSTITUTIONAL CLAUSE

Article I, section 6 of the Constitution provides in part that Senators and Representatives "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The ninth article of the English Bill of Rights of 1689 contained a very similar clause: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." In eighteenth century America, a similar privilege was observed in colonial legislatures and incorporated in Article 5 of the Articles of Confederation. At the Constitutional Convention, the privilege was adopted without significant discussion. See Comment, 73 Col. L.Rev. 125, 126-129 (1972). Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate*, 2 Suffolk Univ. L.Rev. 1, 3-16 (1968); Note, 75 Yale L.J. 335, 336-37 (1965).

A number of significant interpretive questions were left unanswered by the Constitution. Among these are (1) whether the clause applies only to the legislators themselves, or whether the immunity also extends to employees and agents of Members of Congress; (2) whether the immunity extends to acts other than speech or debate within or outside of the Congress; (3) the extent to which the immunity is affected by countervailing legal principles or social interests; and (4) whether the Congress may, by means of a narrowly drawn statute, delegate its powers to discipline Members to the judicial branch.

II. JUDICIAL INTERPRETATION

The Supreme Court has as of now decided seven cases in which the speech or debate clause has been intimately involved. An eighth case has been argued before the Court and is now awaiting decision. In the discussion below, these cases are divided into two groups based on whether a civil or criminal proceeding is involved.

1. In the first group of cases, plaintiffs have brought civil suits against Members of Congress, their aides or employees. A number of these cases have involved the question whether legislators or their aides have acted unlawfully in seeking to obtain written or oral testimony from witnesses. The Court's holdings generally indicate that the immunity under the speech or debate clause will not necessarily prevent the plaintiff from obtaining some sort of civil relief.

In *Kilbourn v. Thompson*, 13 Otto 168 (1880), the Supreme Court faced for the first time the problem of interpreting the speech or debate clause. A recalcitrant witness before a congressional committee who had been imprisoned on a contempt order issued by the House, sued certain Members of the House and its Sergeant at Arms for false imprisonment. The Court held that the House had exceeded its powers in punishing the witness, but ordered the suit dismissed with respect to the House Members based on the immunity conferred by the speech or debate clause. However, the Court permitted the suit to be maintained against the Sergeant at Arms, apparently construing the clause strictly to apply only to Members of Congress. *Id.* at 200-205.

With respect to the scope of acts to which the clause applied, the Court adopted a broad construction, citing the earlier Massachusetts case of *Coffin v. Coffin*, 4 Mass. 1 (1808), which had interpreted a similar clause in that State's constitution. The Supreme Court stated:

"It would be a narrow view of the constitutional provision to limit it to the words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." 13 Otto at 204.

The Supreme Court was not confronted with a significant speech or debate clause issue again until 1951. In *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Justice Frankfurter wrote for the Court in an opinion involving a suit under an 1871 civil rights statute (42 U.S.C. 1983, 1985(3)) against members of a California legislative committee charged with violating a plaintiff's rights. The Court held that Congress had not intended through passage of the 1871 statute to deprive legislators of the immunity granted under state constitutional provisions. In dicta, the Court suggested that a claim of privilege would be weaker where an officer or employee of the legislature was the defendant. *Id.* at 378. Citing *Kilbourn*, the Court declined to define the precise reach of the immunity. *Id.* at 378-379.

In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court was confronted with a tort action pursuant to the same 1871 statute against the chairman and counsel of the Internal Security Subcommittee of the Senate Judiciary Committee for conspiring with Louisiana officials to unlawfully seize property and records of petitioners. In a per curiam opinion, the action was dismissed with respect to the subcommittee chairman (Senator Eastland) based on lack of evidence of his involvement and the immunity granted by the speech or debate clause. However, the Court indicated, citing *Tenney v. Brandhove*, *supra*, that the immunity granted by the clause "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Id.* at 85. Thus, it was held that petitioners could maintain their action against the subcommittee counsel.

In *Powell v. McCormack*, 395 U.S. 486 (1969), Representative Powell sued Members and officers of the House of Representatives for a declaratory judgment that he had been unconstitutionally denied his seat through actions of the defendants. While the Court agreed that the action must be dismissed with respect to the Members, it was held, relying upon *Dombrowski* and *Kilbourn*, that the action could be maintained against employees of Congress.

The Supreme Court has recently granted certiorari in a case involving a civil suit against Members and employees of Congress. *Doc v. McMillan*, 459 F. 2d 1304 (D.C. Cir. 1972), *cert. granted*, 408 U.S. 922. In this case, the petitioners sought to enjoin further publication and distribution of a House committee report on the District of Columbia school system unless names of students were deleted from material relating to disciplinary problems and academic achievement. In a 2 to 1 decision, the court of appeals held that the action should be dismissed both with respect to Members of Congress and officers and employees of the Congress. While it was conceded that the privilege was less absolute with respect to congressional employees, the court held that it applies when their action is taken "pursuant to valid legislative authorization, in furtherance of a proper legislative purpose." *Id.* at 1314-15.

2. A second group of Supreme Court cases involving the speech or debate clause concern criminal prosecutions or grand jury proceedings directed against or involving Members of Congress or their aides or employees. Generally, these cases reflect a propensity on the part of the Court not to immunize from prosecution certain unlawful acts indirectly related to the legislative process.

United States v. Johnson, 383 U.S. 169 (1966), involved indictments of a Congressman under a conflict of interest statute, (18 U.S.C. 281 (1964 ed.)) and for conspiracy to defraud the United States (18 U.S.C. 271). Evidence was produced that the defendant had received money in return for his efforts to persuade the Department of Justice to drop pending indictments against operators of a savings and loan institution, and for giving a speech in the House defending regional savings and loan institutions. In the majority opinion, Justice Harlan wrote that the clause extended protection "at least so far as to prevent it [the speech] from being made the basis of a criminal charge against a Member of Congress of conspiracy to defraud the United States . . ." *Id.* at 180. The case was remanded to the District Court to permit the Government to seek in a new trial to prove its case without evidence relating to the speech. *Id.* at 185. In a partial dissent, Chief Justice Warren, joined by Justices Douglas and Brennan, argued that the Government had proved its case with respect to the conflict of interest counts, and that only the conspiracy count was tainted with improper evidence of the speech. On remand, Johnson was ultimately convicted on the conflict of interest counts, 419 F. 2d 54 (4th Cir. 1969), *cert. denied*, 397 U.S. 1011 (1970). The Court in *Johnson* took care to point out that its decision did "not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* at 185. The Court also did not pass on prosecutions pursuant to a narrowly drawn statute intended by Congress to regulate the conduct of its members. *Id.*

United States v. Brewster, 408 U.S. 501 (1972), involved a U.S. Senator who had allegedly accepted a bribe in connection with his activities and voting on postage rate legislation. In an opinion by Chief Justice Burger rejecting the claim of immunity, the Court held that the acceptance of the bribe was separable from the legislative acts. The guilt of the person accepting the bribe could be established regardless of whether the acts had been performed. *Id.* at 526. In reaching this conclusion, the Court suggested that the privilege could apply only to acts clearly legislative in nature;

"The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.* at 528.

The opinion indicated in dictum that while Members of Congress are generally engaged in legitimate "political matters," the immunity of the speech or debate clause does not extend to every such act. As examples of unprotected political activity, the Court listed—

"* * * a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* at 512.

The Government had taken the position in *Brewster* that while the acceptance of the bribe in connection with a voting act was nominally a protected act within the scope of the clause, the clause nonetheless would not apply because Congress had waived it through passage of the narrowly drawn statute outlawing bribery. Brief for the United States at 10-32. Since the Court found the acceptance of the bribe not a legislative act, it declined, as in *Johnson*, to deal with the question whether Congress could waive immunity for a legislative act through passage of such a statute. *Id.* at 529, n. 18.

The dissenting opinions of Justice Brennan and Justice White, both joined by Justice Douglas, rejected the distinction drawn by the majority between the acceptance of the bribe, and the official act carried out in response thereto. *Id.* at 529, 551. Both argued that drawing this distinction in effect constituted a rejection of the holding in *Johnson* that both the legislative acts and the motives for taking them are protected from inquiry. The dissenting opinions also specifically rejected the Government's argument that the Congress could consent to prosecution of its Members under a narrowly drawn statute.

Gravel v. United States, 408 U.S. 606 (1972), was decided on the same day as *Brewster*. The *Gravel* case involved motions by a U.S. Senator to quash a grand jury subpoena requiring his assistant to appear as a witness in connection with the alleged theft and transmittal of top secret documents known as the "Pentagon Papers". The assistant had helped Senator Gravel in connection with a midnight meeting of the Senate Subcommittee on Buildings and Grounds in which the Senator read extensively from the Pentagon papers and placed the entire 47 volumes in the public record. Later, reports in the press indicated that Senator Gravel had arranged for the papers to be published by Beacon Press.

The majority opinion by Mr. Justice White (joined by four others) held that the speech or debate clause protected both the Senator and his aide from being questioned as to legislative acts of the Senator. In holding that immunity extended equally to Members of Congress and their aides, the Court distinguished *Kilbourn*, *Dombrowski*, and *Powell*, each of which permitted a civil suit to be brought against employees of Congress, on the grounds that each of these cases involved acts not within the protection of the speech or debate clause. *Id.* at 618-622. Had the illegal acts been carried out by Members of Congress (*e.g.*, the unlawful arrest in *Kilbourn*), they would not have been protected by the speech or debate clause. *Id.* at 621.

While holding that both Senator Gravel and his assistant were immune from any questioning relating directly to the subcommittee meeting in which the Pentagon papers were read, the Court ruled that the immunity did not extend to the arrangements with the outside publisher for republication of the papers. Provided no legislative act of the Senator was impugned, his aide was subject to questioning about these matters by the grand jury. *Id.* at 622-627. The Court cited the English case of *Stockdale v. Hansard*, 112 Eng. Rep. 1112 (K.B. 1839), for the proposition that while members of Parliament enjoyed absolute immunity for libelous statements during debate, any republication of such matter outside the House could be subject to suit. *Id.* at 622-623.

As another example of nonprotected activity, the Court cited *Johnson* for the proposition that the cajoling or exhortation of the executive branch with respect to the administration of a federal statute is beyond the reach of the Clause. *Id.* at 625. As a general matter, the Court stresses that—

*** * * [l]egislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625.

The Court's holding that outside republication of classified documents is not within the scope of protected legislative acts is a narrow one. The majority opinion stresses that neither Congress nor the full committee had authorized the publication, thus negating arguments that republication was a "legislative act." *Id.* at 625-627. However, the Court also ruled that Senator Gravel's aide could be questioned about the source of the documents provided "no legislative act is implicated by the questions." *Id.* at 628-629.

The two dissenting opinions by Justice Douglas (at 633) and Justice Brennan (joined by Justices Marshall and Douglas) (at 648), disagreed with the holding of the Court with respect to questioning as to the source of the papers as well as questions directed at possible arrangements to republish the papers. Justice Brennan appeared to view the majority opinion as a broad holding removing the "informing function" of Members of Congress from the protection of the speech or debate clause. *Id.* at 649-650.

III. EVALUATION OF THE CASES

Viewing the seven Supreme Court cases together, it is apparent that many of the pronouncements made in the opinions are in the nature of not altogether consistent dicta which probably would not control in future litigation presenting unique factual situations. Nonetheless, based on the actual holdings of the Court in these seven cases, a number of interpretive questions relating to the speech or debate clause can now be answered with considerable certainty.

1. While the earlier decisions of the Supreme Court indicated that the immunity extended by the clause would not apply with equal force to Members of Congress and their aides or employees, the Court in *Gravel* has clearly held that the privilege applies equally to both groups as to the activities it properly reaches. It would appear that despite some apparent inconsistencies with prior decisions, a court now has only one essential group of issues to resolve in any case involving immunity under the clause. The essential question is whether or not the act subject to challenge is within the sphere of protected legislative acts.

2. The scope of the acts covered by the speech or debate clause has been only partially resolved by the Supreme Court decisions to date. The *Kilbourn* decision established that more than actual speech or debate is covered. The dicta in this case urging a broad interpretation of the clause appears on the surface to run counter to the recent pronouncements of the Court in *Brewster* and *Gravel*. However, leaving the dicta aside, the specific holdings of the cases do establish certain types of acts which are clearly covered or not covered by the clause. Thus, for example, speech and debate, whether before the whole House or within a committee or subcommittee, are clearly covered by the clause. Likewise, the act of voting is clearly protected, whether in committee or in plenary session, although acceptance of a bribe in connection with a vote is not protected. Dicta in *Kilbourn* also indicates that written reports and resolutions are subject to protection, a view which later decisions have not questioned.

3. It is also fairly well established that certain non-speech activities of legislators or their employees will not be subject to protection where possible infringement of the rights of private persons is involved. Thus, the arrest of a recalcitrant witness in *Kilbourn*, and the seizure of records and documents in *Dombrowski*, were held to be unprotected acts. The majority in *Gravel* views these acts as beyond the scope of the clause, regardless of whether a Member of Congress or his aide is responsible for the action.

4. Even those activities of legislators nominally involving speech will be unprotected if they are not basically legislative in character. The *Johnson* case

suggests that attempts to influence the executive branch or an administrative agency as to the interpretation of a statute are unprotected acts. And *Brewster* has now held that the acceptance of a bribe in connection with a legislative act is separable from the act and is not subject to the protection of the clause. Thus, at least where bribery or corruption is involved, these decisions indicate a propensity on the part of the Court not to protect the conduct of a legislator unless it is clearly and inextricably linked to the kind of legislative act traditionally within the scope of the clause.

5. As yet unresolved is the question whether Congress has the power to delegate by statute its power to discipline Members for certain narrowly defined acts. This question was specifically left open by the Court in *Johnson* and *Brewster*. The three dissenting Justices in *Brewster* argued that the Congress could not waive the immunity of an individual Member by statute. Opinion of Justice Brennan, at 550; Opinion of Justice White, at 563. Others have argued that the power to discipline its own Members pursuant to article I, section 5, could be delegated by the Congress to the courts. 73 *Columbia L. Rev.* 125, 149-52 (1973). Such a delegation would not appear to seriously threaten the independence of the Congress inasmuch as Congress would be free at any time to repeal the delegation.

6. It might be argued that the holding of the Court in *Gravel* could have an undesirable chilling effect on the freedom of Members of Congress to seek out information on the administration of our Government and communicate it to the general public. Comment, 73 *Columbia L. Rev.* 125, 146-152 (1973). In this regard, it is important to recognize that the majority in *Gravel* specifically held that the actions of Senator Gravel and his aide in connection with the subcommittee meeting were within the scope of protection of the speech or debate clause. Thus, Senator Gravel clearly was protected in making the classified material available to the public, provided only that there was no "outside" publication which could be construed as a nonlegislative act. Even with respect to the source, the Court permits questioning of the Senator's aide only to the extent it is relevant in obtaining information about a "leak" of classified materials in violation of the law.

If Members of Congress receive classified documents, the holding in *Gravel* does not prevent congressional review of the material, and, in appropriate circumstances, its official publication. For example, the documents could be placed in the hands of the responsible committee for review in closed hearings. If the committee or the Congress as a unit vote to release the classified material, legislative immunity would clearly apply. If the Congress determines that the laws relating to the classified materials are not working properly, it can, of course, change these laws. Thus, the Supreme Court's decision in *Gravel* cannot be viewed as significantly hampering Congress in dealing with the proper handling of classified information.

The position outlined by the minority in *Gravel*, had it prevailed, would likely have given rise to a number of problems. If employees of the Government who have unlawfully conveyed classified materials to a Member of Congress are protected, the executive loses a large degree of control over its employees with respect to the secrecy of documents. Any employee need find only one of the 535 Members of Congress who is sympathetic to his views in order to violate the law with impunity. Such a decision on the part of the Court, as a matter of constitutional law, might render the enforcement of our nation's security laws extremely burdensome if not impossible.

CONCLUSION

Some may view the Supreme Court's holdings in such cases as *Gravel* and *Brewster* as a threat to the powers of Congress to inquire and inform. I think this an extreme view. In my judgment, the Court's interpretations of the speech or debate clause afford adequate protection for the legislative function.

As a constitutionally defined immunity, the speech or debate clause itself cannot, of course, be expanded by legislation. Only a constitutional amendment could effect such a change. On the other hand, as the Court noted in the *Brewster* case, the practical effect of an expansion of congressional immunity could be accomplished in some areas by enactment of statutes which exempt members of Congress from otherwise general civil or criminal proscriptions. There may be, however, serious objections to this approach. For example, few would suggest that Members of Congress should be exempt from the bribery statutes. And a legis-

lative exemption having the effect of insulating Members of Congress from redress for violations of the constitutional rights of others would raise constitutional questions.

In sum, I do understand the concern, both institutional and personal, which arises in Congress whenever court decisions touch on the scope of congressional immunity from suit under the speech or debate clause. However, legislative action seeking to delimit the scope of immunity may well raise difficult constitutional questions, and would surely involve complex policy issues. Significant issues in the area remain unsettled, some of which may soon be resolved in pending cases. In light of all these considerations, this is an area where Congress well may wish to proceed with great caution.

Mr. DIXON. I have with me this morning Mr. Warren Grimes, attorney-advisor in the Office of Legal Counsel in the Department of Justice as my associate.

Chairman METCALF. Is Mr. Grimes also a member of the bar?

Mr. DIXON. Yes; he is attorney-advisor in the Office of Legal Counsel, Department of Justice.

Chairman METCALF. We are delighted to have you along.

Mr. DIXON. I would suggest perhaps I can sort of skip through this statement, indicating where I am at various points.

The introduction expresses a concern and sympathy for the desire of Congress to inquire into this matter of congressional immunity.

Chairman METCALF. You say on your first page that, in your opinion, which is only a self-serving declaration in the language of the profession, this is a relatively broad interpretation that the Supreme Court has given the speech and debate clause.

I see later on where you do cite the law review article by our previous witness and he certainly didn't agree with you that it was a broad interpretation, nor did Justice Goldberg, nor have any other witnesses. They have felt it was a narrow and circumscribing interpretation of the speech and debate clause.

Mr. DIXON. We are speaking of the cases from *Kilbourn v. Thompson* on down—

Chairman METCALF. Yes.

Mr. DIXON [continuing]. And not particularly speaking about the *Brewster* and *Gravel* cases.

Chairman METCALF. Weren't you speaking about *Brewster* and *Gravel* where you say, "While the Supreme Court has given the speech and debate clause relatively broad interpretation"?

Mr. DIXON. We are speaking of the entire sequence of cases summarized in our statement, and we find very broad language in *Kilbourn v. Thompson*, of which of course—

Chairman METCALF. Most of it is rejected in the *Brewster* and *Gravel* cases.

Mr. DIXON. We must go to the holdings. If we go to the holdings of these cases, we find that the Supreme Court has not restrained the scope of congressional operation, the discharge of the legislative functions, and the very vital informing function as much as some persons seem to think.

Chairman METCALF. I notice you cite Mr. Colla's law review article which we put into the record as one of the citations—this is on page 3?

Mr. DIXON. That is correct.

Chairman METCALF. Did you agree with it when you read it?

Mr. DIXON. Not entirely. We also read a long note in the *Columbia Law Review* which we did not cite here.

Chairman METCALF. Yes.

Mr. DIXON. Correction, we do cite that.

Chairman METCALF. You also cite a note in the Yale Law Journal?

Mr. DIXON. Yes; that is correct.

Perhaps the most precise answer to your question, Mr. Chairman, could be this. Despite the dicta in *Brewster* and *Gravel*, some of which was criticized this morning by Professor Cella, the holdings were quite narrow, and a balanced assessment would involve considering the *Johnson* case as well.

There have been three cent cases. In *Johnson* there was a conflict of interest charge, analogous to a bribery situation, regarding a Maryland savings and loan association. In *Brewster* there was a bribery indictment. In *Gravel*, which was somewhat different and doesn't fit in the category of *Johnson* and *Brewster*, there was an inquiry into private republication of matter put in the Congressional Record, and also a statement there concerning how much the grand jury could inquire as to the source. Taking the first two cases, *Johnson* and *Brewster*, and looking at their actual holdings, we do not feel that they, by extending judicial power to the trying of conflict of interest charges, or bribery charges, inhibit Congress in any way.

Speaking of dicta, *Marbury* against *Madison* there was a long, long opinion now ignored, and a long, long sequence of discussion of the illegality of the act of the executive in withholding commissions of office, which has now passed by the wayside. The actual holding was that the Court had no jurisdiction. I don't think we can really assess what might happen in the future under the dicta in *Brewster* and the holding itself I think is unobjectionable.

Regarding the *Gravel* case, as we point out in our testimony discussing that on page 12 and thereafter—

Chairman METCALF. We have lost all of our colleagues and we will have to continue to have them go.

I am going to recess this hearing until 2 o'clock at which time we will let you continue and I apologize to you.

We will continue, then, at 2 o'clock.

Representative DELLENBACK. If I may briefly, it seems to me this is very important and valuable testimony to us and rather than trying to put the witness in a position where we are rushing and moving in and out it is far better to come back with him. This is too important.

Chairman METCALF. We will reconvene at this point, if we can all remember where we are, at 2 o'clock.

[Whereupon, the committee was recessed until 2 p.m. the same day at 12:15 p.m.]

AFTER RECESS

[The committee reconvened at 2 p.m., Hon. Lee Metcalf, chairman, presiding.]

Chairman METCALF. The committee will be in order.

At this time we have statements from Congressman Saylor of Pennsylvania and Congressman Annunzio of Illinois, as well as a statement from Delegate Won Pat of the territory of Guam, for the record.

Without objection, they will be included in the record after the testimony of Mr. Dixon.

If you can pick up where we left off, Mr. Dixon, please go ahead.

Mr. DIXON. Thank you, Mr. Chairman.

I'm pleased to return and give further testimony, after the noon recess.

I might say as an aside that this morning you mentioned in introduction that I had been in my present position approximately 1 month. I think I can pin that down more precisely. This is my fourth anniversary today, my fourth week anniversary in my present position, and I am pleased to spend it with you and do the best I can to be informative and helpful to the committee.

I suggest that I go forward to the part of my testimony which deals with evaluation of the various cases, which discusses the cases at some length.

Representative DELLENBACK. Mr. Chairman, pardon my interruption.

So that we may understand the capacity in which the witness speaks, do we understand that he is here speaking, not with an impressive group or gathering of credentials which are his own—I read that with a great deal of interest—but is here speaking officially for the Department of Justice in the views that he's representing?

Mr. DIXON. Yes; Mr. Dellenback, I am representing the Department of Justice and giving our views in response to the request of the committee.

Chairman METCALF. I was going to ask you that, and this may be an appropriate time where it may be put in the record.

We used to have a little statement at the end of every person's statement who appeared in behalf of the administration, and this statement had been cleared by the Office of Management of the Budget, in accord with the President's program.

For some reason or other, that doesn't appear any more. Have you cleared this with the Office of Management of the Budget?

Mr. DIXON. Yes, we have, Mr. Chairman.

Chairman METCALF. It's absence doesn't mean that you haven't submitted it to the Office of Management of the Budget?

Mr. DIXON. That observation is correct. It has been submitted in the usual way, which you are familiar with, I believe.

Chairman METCALF. And you're speaking for the Attorney General and the Department of Justice?

Mr. DIXON. That is correct.

Representative DELLENBACK. Mr. Chairman.

Chairman METCALF. Yes.

Representative DELLENBACK. That intrigues me. I hadn't thought of that particular possibility.

Is it considered that there are dollar implications to what this committee is—

Chairman METCALF. No. I just wondered about the absence. In the Johnson administration, in the Kennedy administration, in the Eisenhower administration, in all my experience, it used to appear, and I just wondered if it was gone.

Representative DELLENBACK. My question is, for my own edification, is it necessary to clear this testimony with OMB? Is all testimony by all administration spokesmen cleared by the Office of Management of the Budget, whether or not it is deemed to have fiscal consequences?

Mr. DIXON. I cannot answer that, because I lack adequate factual knowledge.

I can say this, however: That in the 1 month I have been in this position I have appeared before various committees—I believe this is my fifth time—and my previously prepared statements were submitted to OMB. Two were regarding the proposal to retroactively require senatorial confirmation of the Director of OMB, and, in fact, I appeared twice on that topic with separate statements.

Chairman METCALF. Did you make the same statement each time?

Mr. DIXON. No. My respected and dear friend and critic, Congressman Brooks, had a new proposal which was made during my first testimony, and I came back to expound on that, after time for reflection and deliberation. It was not in draft form at the time that I first appeared. The same OMB approval occurred regarding my newsmen's privilege testimony.

Chairman METCALF. Mr. Dixon, I am not criticizing this business of the requirement of submission of statements to OMB. Somebody has to have a clearance for statements, to be sure that they are in accord with the President's program. I just wanted to make it perfectly clear—if you will allow me to coin a phrase—that the omission of that little clause at the bottom of the statement didn't mean that it hadn't been cleared by OMB.

Mr. DIXON. That is correct. Maybe that was a secretarial error, although if it was it's been made three or four times in the last 3 or 4 weeks.

Chairman METCALF. Yes. I notice that since Mr. Ash became Director of OMB, we don't have that any more.

Mr. DIXON. The clearance clause, as you indicated, is to make sure there are no inconsistent additional inputs, and that we speak with as single a voice as possible.

Chairman METCALF. Please don't take it as criticism. It's just a matter that it has been done under every administration. Thank you.

Are you through talking Mr. Dellenback?

Representative DELLENBACK. Yes. Thank you very much, Mr. Chairman.

Chairman METCALF. Go ahead, please, Mr. Dixon.

Mr. DIXON. I'll pick up on page 16, where I would like to talk about our evaluations of these cases and their conclusions. There are seven Supreme Court cases, and it may be noted that they contain not altogether consistent dicta. We would hypothesize that the dicta would not control future holdings and should be taken with a grain of salt.

Nevertheless, based on the actual holdings of the Court, a number of questions relating to the speech or debate clause can now be answered with at least some certainty, perhaps much certainty.

First, while the earlier decisions of the Supreme Court indicated that the immunity extended by the clause would not apply with equal force to Members of Congress and their aides or employees, the Court, in the *Gravel* case, has clearly held that the privilege applies equally to both groups in regard to the activities the clause properly reaches. In that sense, the *Gravel* case is an advance, and expands the congressional protection under the speech or debate clause.

Thus, the essential question from now on apparently is whether or not the act, subject to challenge, is within the sphere of protected legislative acts. If so, the Member of Congress and his legislative aides or assistants equally share the constitutional immunity.

Second, the scope of the acts covered by the speech or debate clause has been only partially resolved by the Supreme Court decisions to date. The *Kilbourn v. Thompson* opinion said that more than actual speech or debate is covered. The dicta in that case urged a broad interpretation of the clause.

That dicta may appear to run, on the surface, counter to the recent pronouncements of the Court in *Brewster* and *Gravel*, but it is merely dicta against dicta. Leaving dicta aside, the precise holdings of the cases do establish certain types of acts which are clearly covered or not covered by the clause. Thus, for example, speech and debate, whether before the whole House or within a committee or subcommittee, are clearly covered by the clause. Likewise, the act of voting is clearly protected, whether in committee or in plenary session. The acceptance of a bribe in connection with a vote is not protected. Dicta in *Kilbourn* also indicates that written reports and resolutions are subject to protection, a view which later decisions, including *Brewster* and *Gravel*, do not seem to question.

Third, it is also fairly well established that certain nonspeech activities of legislators or their employees will not be subject to protection where possible infringement of the rights of private persons is involved. Thus, the arrest of a recalcitrant witness in *Kilbourn*, and the seizure of records and documents in *Dombrowski*, were held to be unprotected acts. The majority in *Gravel* reaffirmed the view that these acts are beyond the scope of the clause, regardless of whether a Member of Congress or his aide is responsible for the action.

Fourth, even those activities of legislators nominally involving speech will be unprotected if they are not basically "legislative" in character. The *Johnson* case suggests that attempts to influence the executive branch or an administrative agency as to the interpretation of a statute are unprotected acts. And *Brewster* has now held that the acceptance of a bribe in connection with a legislative act is separable from the act and is not subject to the protection of the clause.

Fifth, as yet unresolved is the question whether Congress has the power to delegate by statute its power to discipline its Members for certain narrowly defined acts. This question was left open specifically by the Court in *Johnson* and *Brewster*. The three dissenting Justices in *Brewster* argued that the Congress could not waive the immunity of an individual Member by statute. Others have argued that the power to discipline its own Members, pursuant to article I, section 5, could be delegated by the Congress to the courts. On that we cite the recent note in the *Columbia Law Review*. Such a delegation would not appear to seriously threaten the independence of the Congress, inasmuch as Congress would be free at any time to repeal the delegation. It's simply a congressional choice as to how to exercise, in a given instance, the power of discipline.

Sixth, it might be argued that the holding of the Court in *Gravel* could have an undesirable chilling effect on the freedom of Members of Congress to seek out information on the administration of our Government and communicate it to the general public.

Here I think we must stress the actual facts of *Brewster* and *Gravel*.

It is important to recognize that the majority in *Gravel* held that the actions of Senator Gravel and his aide, in connection with the subcommittee meeting were within the scope of protection of the speech or debate clause, even though they were unilaterally exposing what

was then classified as top secret information. Thus, Senator Gravel clearly was protected in making the classified material available to the public, by the device of reading it into the Congressional Record, provided only that he resort to no "outside" publication which could be construed as a nonlegislative act.

Even with respect to the source, the Court permits questioning of the Senator's aide only to the extent it is relevant in obtaining information about a "leak" of classified materials in violation of the law, in other words, as Justice White put it, an inquiry into third party crimes. There we have a balancing of interest between criminal law enforcement and congressional immunity in pursuit of this body's legislative function.

If Members of Congress, by virtue of an illegal breach of security, receive classified documents, the holding in *Gravel* does not prevent congressional review of the material, and, in appropriate circumstances, its official publication. For example, the documents could be placed in the hands of the responsible committee for review in closed hearings. If the committee or the Congress, in a closed hearing, as a unit vote to release the classified material, legislative immunity would clearly apply. In that instance, the informing function would be served. The public would be apprised of the information. If the Congress determines that the laws relating to the classified materials are not working properly, it can, of course, seek to change these laws. Thus, the Supreme Court's decision in *Gravel*, we feel, cannot be viewed as hampering significantly the function of Congress in dealing with the proper handling of classified information.

The position of the minority in *Gravel*, had it prevailed, would likely have given rise to a number of problems. If employees of the Government who have unlawfully conveyed classified materials to a Member of Congress are protected, the executive loses a large degree of control over its employees with respect to the authorized secrecy of documents. Any employee need find only one of the 535 Members of Congress who is sympathetic to his views in order to violate the law with impunity. Such a decision on the part of the Court, made as a matter of constitutional law, might render the enforcement of our Nation's security laws extremely burdensome, if not impossible.

To conclude, some may view, and some do view, the Supreme Court's opinions in *Gravel* and *Brewster* as a threat to the powers of the Congress to inquire and inform. We think that is a somewhat extreme view.

Chairman METCALF. When you say "we," you are talking about the Department of Justice?

Mr. DIXON. Our departmental position, yes. Correct, Senator.

I think this is an extreme view of the two decisions, because the holdings are sufficiently so narrow as to pose no serious threat.

Our view, or my view, is that the Court's interpretations of the speech or debate clause do afford adequate protection for the legislative function, again stressing the facts of these cases.

As a constitutionally defined immunity, the speech or debate clause itself cannot, of course, be expanded by legislation, in the sense of rewriting it, without a constitutional amendment, nor can Congress reverse by statute a Court interpretation of it.

We do realize that there is a certain amount of play in the joints regarding our constitutional clauses. On the other hand, as the Court noted in the *Brewster* case, the practical effect of an extension of congressional immunity could be accomplished in some areas by enactment of statutes which exempt Members of Congress from otherwise general civil or criminal proscriptions.

There may be, as mentioned this morning, however, serious objections to this approach. It may be politically inexpedient, or not desired by Congress in principle.

For example, few would suggest that Members of Congress should be exempt from the bribery statutes. And a legislative exemption having the effect of insulating Members of Congress from redress for violations of the constitutional rights of others which were at issue, arguably, in the *Dombrowski* case, would raise constitutional questions.

In sum, I do understand the concern, both institutional and personal, which arises in Congress whenever court decisions touch on the scope of congressional immunity from suit under the speech or debate clause. However, legislative action seeking to delimit the scope of immunity may well raise difficult constitutional questions, and would surely involve complex policy issues. Many issues unresolved may be settled in pending cases. In the light of all these considerations, we simply suggest that, though we express sympathy with the problem, this is an area where Congress may well wish to proceed with great caution.

Thank you, Mr. Chairman.

Chairman METCALF. Thank you very much, Mr. Dixon.

I know that Senator Gravel and Congressman Dellenback are going to inquire as to several matters. I'm not bypassing Congressman Cleveland or Congressman Brooks, but I know of the interest and concern of those two members of the committee.

But before you go into that——

I notice that you changed a little bit your prepared statement in your summary. Let me read it to you:

"As a constitutionally defined immunity, the speech or debate clause itself cannot, of course, be expanded by legislation."

You have just shrugged that off—you used to be a law professor—with that "of course," and I would like to have you support that statement by a citation of a single case.

I looked through USCA of the Constitution. There are about 10 volumes of United States Code annotated. So I brought along the publication on the Constitution of the United States with annotations, and, in just a rapid horseback survey during the lunch hour, I couldn't find a single case that supports the proposition that when you have a constitutional protection you can't expand that by legislative process.

Mr. Dixon. It would be possible, without changing the language in the Constitution, by amendment——

Chairman METCALF. I'm not talking about the language in the Constitution.

Mr. Dixon. It would be possible to interpret the Constitution's speech or debate clause, and by legislation, by legislative amendment, to make it more expansive, and whether the legislation were proper or not would then be a matter for judicial review.

Chairman METCALF. We're not talking about interpretation of the Constitution.

Is it your position that because we have protected the freedom of speech in the first amendment that we cannot pass any legislation to protect the rights of the fourth estate? Is that the position you are taking?

Mr. DIXON. Regarding the fourth estate and the proposed newsmen's privilege legislation, we feel there are serious constitutional problems in regards to these additional protections, expanding beyond the Constitution of the United States.

Chairman METCALF. Mr. Dixon, are you talking for Mr. Kleindienst and other attorneys down there, that when there are constitutional protections, that you cannot expand those by statutes?

Mr. DIXON. I think we would have to take this case by case, Mr. Chairman.

Chairman METCALF. There isn't any single case, Mr. Dixon, that I can find—and you've cited a whole lot of cases, and you've cited several law review articles, and so forth, in your analysis—but will you cite me a case that supports the proposition that we cannot amplify the freedom of speech or debate clause by further legislative process? One case, that shows that we cannot say that because the first amendment says, "freedom of speech," we cannot say, "Look, we're going to, by legislation, and by statute, give additional freedom"? Is there any case? Do you know of any?

You say, "of course," but you can't shrug it off with "of course."

Mr. DIXON. We have no instance, of course, with the speech or debate clause.

If I can offer hypothetically two constitutional principles?

Chairman METCALF. Offer anything.

Mr. DIXON. A hypothetical situation, whereby it could occur that the speech or debate clause might be expanded by legislation so broadly as to arguably impair the due process rights of the citizens to sue a Member of Congress for some special problem.

Chairman METCALF. Then we have two constitutional provisions in conflict.

Mr. DIXON. Or a separation of powers problem might arise in a criminal context, possibly.

Chairman METCALF. In a criminal context, you will admit, the proposition that was stated this morning is that there is no common criminal law as far as Federal jurisdiction is concerned. Isn't that correct?

Mr. DIXON. Yes.

Chairman METCALF. And it's up to Congress to enact criminal law, and if Congress doesn't specifically enact criminal law that would be with due process and all these other provisions and protections that we surround a criminal with, there isn't any crime committed, isn't that right?

Mr. DIXON. Yes.

Chairman METCALF. If we just say that we don't enact a criminal law, as far as these various immunity provisions for the judiciary, or the executives, or the U.S. district attorney, if you please, and for Members of the Congress, then there isn't any crime committed, is there?

Mr. DIXON. That is correct. The Constitution doesn't—

Chairman METCALF. It doesn't make any difference what the Constitution says.

Mr. DIXON. Congress has to fill in the whole structure of Government and the Federal law. It's a mission of Congress, really.

Maybe we're not so far apart on these things. It may be a semantical difference.

Chairman METCALF. I just do not like "of course, cannot be expanded by legislation."

Where we have a basic protection in the Constitution, whether it's the first amendment, or the fifth amendment, or the speech or debate clause, it seems to me that it can be expanded—doubled or tripled—by legislation. The only control on Congress is we can't infringe with the basic proposition that's laid down in the Constitution.

Mr. DIXON. I think I can concede that.

And, if we take it case by case, the real question would be whether or not some proposed law impinged on some other constitutional right, thereby calling into play a problem of interpretation or balance.

Chairman METCALF. That's true. So that if we said that Congressman O'Hara, in trying to invoke the freedom of speech or debate clause, violated the civil liberties under the 14th amendment, or something else, there would be a serious constitutional question.

Mr. DIXON. That's what I had in mind.

Chairman METCALF. The proposition I am concerned with—and I know Congressman Dellenback is, and Mr. Cella this morning talked about, and Justice Goldberg talked about—is that the way to approach this is to pass either rules, concurrent resolutions, or enact legislation that will define these things, so that the Supreme Court will have something definite and specific to go on.

I disagree with you—that isn't to say you're wrong, because the Supreme Court has spoken—that there is a broad interpretation of the constitutional provision. But the Court has spoken, and it seems to me that we are confined by the dicta too, because that's the way this Court is going to go, if we can predict anything in any Supreme Court at any time.

It seems to me that these constitutional provisions were put in as basic minimum protections, and Congress has an absolute right to go above that, to define criminal responsibilities, to define civil immunity, all of those things.

So I disagree with that statement that you made, that of course, we can't amplify the Constitution by legislation.

Mr. DIXON. Perhaps, all I can say again is if we put this in the context of maintaining an overall constitutional balance and not allowing an advance under one clause to impinge on a freedom under a second clause, then perhaps we are in agreement.

Chairman METCALF. We are in agreement, if we say Congress passes some legislation for legislative immunities that would conflict with another section of the Constitution, then it would be, of course, up to the Court to say where the boundary lines are.

I'm impressed by your discussion, and your summary, and your analysis of the cases and case law, Mr. Dixon.

However, I don't quite understand what you mean, Mr. Dixon, when you say, "If the Congress determines that the laws relating to the classified materials are not working properly." What laws?

Mr. DIXON. The Freedom of Information Act refers to classified materials in one of its exception clauses.

Chairman METCALF. And atomic energy.

Mr. DIXON. Yes, atomic energy.

Chairman METCALF. But there are no general laws, are there, relating to classified materials?

Mr. DIXON. Much of that is by Executive order.

Chairman METCALF. Yes, under the war powers of the President.

I'm not quarreling with some of these, but I am quarreling with the kind of language that you have put in your statement, that the laws are not quite laws on classified materials. I suppose the President, under his war powers in the Constitution, has a perfect right to invoke secrecy. I'm certainly not going to argue with you about that.

I've taken too much time, Mr. Dixon. Go ahead and respond.

Mr. DIXON. I think your point is well taken that security law—including under "law" all instruments of an Executive order type, or statutes, or of whatever type, in the broadest sense of the word "law"—I think your point is well taken that it is not all statutory, and therefore it is not all immediately subject to congressional review.

Chairman METCALF. And of course Congress can repeal or revoke the Executive order by a law. Don't you agree?

Mr. DIXON. I think in many cases that is true. I think in some cases we might get a constitutional collision, but it's a very broad power.

Chairman METCALF. And, indeed, many Executive orders are derived from such joint powers in the first place.

I'm glad we've at least reached a common ground.

Mr. Cleveland.

Representative CLEVELAND. Thank you, Mr. Chairman.

Have you read the statements of Senator Ervin or Justice Goldberg that were given before this committee?

Mr. DIXON. I have just received, as of this morning, copies of some. This is Justice Goldberg's [indicating] that came into my hands this noon. I do not have Senator Ervin's statement.

Representative CLEVELAND. You haven't read Justice Goldberg's statement yet?

Mr. DIXON. No. I have not read it. I've read a page or two.

Representative CLEVELAND. Would you turn to page 7 of that statement and read quickly with me the second paragraph, and I will read this for the record:

In describing the relative roles of the Court and the other departments of Government, one must begin and end with a proposition fundamental to our system of government. The Constitution is interpreted by the Court as the supreme law of the land. Once the Supreme Court has decided that certain basic rights are constitutionally protected, these protectives may not be diminished by any other department, Federal or State, but there is nothing in our system of government which precludes the other branches from supplying the spirit of constitutional protections beyond what the Court has mandated.

Justice Goldberg observed that "the Constitution is admonitory or hortatory," and there's a citation. "What the Constitution does not command it may still inspire."

I think that the line of questioning of the chairman, which these words of the justice raised in our minds, is what raises my question about your statement. Apparently your conclusion in your statement is that the constitutionally defined immunity, the speech or debate clause itself, cannot be expanded by legislation.

Your statement and Justice Goldberg's statement, as I understand them, are squarely in conflict. You are entitled to your opinion, and the justice is entitled to his opinion.

But now that you have read the words of the justice, I wonder if you wouldn't want to reconsider, for the record, or at a later time submit for the record, some amplification of that rather startling phrase which the chairman has just called to your attention.

Mr. DIXON. Yes, Mr. Cleveland. I think we can do two things: One, submit for the record a considered comment on the matter you raise here; and second, I might just offer now the thought, which we could explore further at our leisure, that what is a privilege on behalf of one person by its very nature has an adverse effect, or impact, to an extent, on the interest of another person or institution.

All privileges that prevent grand juries from inquiring in various directions inhibit the law enforcement function to a certain extent. I think there can be some privileges that, even by expansion, may not affect other interests very much. Perhaps certain aspects of free speech would qualify for that.

There are other privileges which if expanded do, indeed, defeat certain other interests.

Representative CLEVELAND. I understand that, and that's a perfectly valid statement, but I want to say right here that what we're talking about, is whether, under our system of Government, Congress can by legislation expand on the speech or debate clause, not changing the words of the Constitution, but at least by legislation, expand the scope of the speech or debate clause.

Senator Ervin says we can do it. Justice Goldberg says we can do it. You say we can't do it. I really think you want to reconsider that, because if you are going to take this very narrow position, that we can't expand this, I want to remind you that there are going to be some other issues in which your department is going to be involved. Let's face it, one of them is right here now. It's not here at this hearing, but you know the one I'm talking about. It's executive privilege. And if you people are going to paint yourself into the narrow interpretation corner on legislative immunity, I don't see how you are going to be able to take a posture of having a broad interpretation when you get to executive immunity or privilege. It doesn't make any sense to me. You can't have it both ways.

Mr. DIXON. I think what we're trying to say here in this very cryptic sentence in the conclusion here—and we sometimes make conclusions totally cryptic to make them short—is that the constitutional clause itself can be rewritten, or revised, expanded or contracted, either way, only by amendment.

It would not preclude legislative expansion of the general concept of congressional immunity.

Representative CLEVELAND. OK. Then you're back with Justice Goldberg, and that statement of yours has at least been amplified by your testimony—that one sentence—because that sentence doesn't say that. I agree with what you just said.

Mr. DIXON. I tried to clarify it the best I could.

Representative CLEVELAND. And I'm sure that the chairman will agree with me, that if you feel that there is anything else you would like to submit in this regard for the record, we would welcome it.

Do you find any analogy in the legislative immunity question that we are now talking about and the proposed shield laws that are now being considered by various committees in Congress?

Mr. DIXON. I do not find a very close analogy. To be sure, in each case a protection is being created, or claimed, from disclosure of one kind or another. But, regarding the speech or debate clause, we deal with one of the three great institutions of our Government, the Congress, and the express and implied requirements for its effective functioning, which implied requirements include powers of investigation, defense against crime and punishment, and so on.

By contrast, where we deal with the press we are not dealing with one of the great institutions of our Government, despite the use of the phrase "the fourth estate." We're dealing with a species of private activity, a very important private activity. I was a journalist myself once very briefly many years ago. But it is a species of private activity, and certain aspects of it are protected by the first amendment from governmental interference.

The Supreme Court held in the *Branzburg* and *Caldwell* cases last June that the first amendment did not go so far as to immunize a newsman from testimony before a grand jury inquiring into a crime of which he may have knowledge.

So I find, at the outset, the difference between Congress as an institution, one of the three great branches of our Government, and the business of being a newsman. The press is given the protection of the first amendment in certain regards, but not in regard to the privilege question. *Caldwell* said, "No," on that last June, and that is why the drive has arisen to do by legislation what the Supreme Court said the Constitution does not do automatically for newsmen.

It might be well if I submit for the record here, if you would desire, the testimony I gave on newsmen's privilege about 2 weeks ago before Senator Irvin's committee. We have testified on that—by "we," I mean the Department of Justice—three times since last September: Twice on the House side before the House Judiciary Subcommittee, of which Mr. Kastenmeier is the chairman, in September and in January; then I testified, as I said before, before Senator Ervin's committee 2 weeks ago.

Representative CLEVELAND. What position did you take on the shield law?

Mr. DIXON. On the shield law, we raised a constitutional question we felt very strongly about with regard to extending a shield law to the States. Regarding the question of a shield law applicable to Federal proceedings, we felt that this was an involved policy question. We were strenuously opposed to an absolute shield law, but we had no firm position against the desire to give some protections by a qualified privilege law.

We felt the proposed qualified privilege law is seriously in need of some careful draftsmanship. We also pointed to our own Department of Justice guidelines, which are very stringent and limit the subpoena process. The Department of Justice feels they have worked well, so well indeed that a shield law is not needed at the Federal level.

I can submit these statements, if desired. The statement before Senator Ervin also included an appendix which described the experience under the Department of Justice guidelines.

Representative CLEVELAND. Would you send those to the committee so the staff can look them over, and so we can decide whether they should be made a part of the record at a later date?

Mr. DIXON. Yes, I'd be glad to.

[The material was submitted to the committee and has been made a part of the permanent files for this hearing.]

Representative CLEVELAND. I don't want to take too much more time, but I might say there's been quite a lot of discussion in this hearing as to whether or not the shield laws are analogous to the immunity laws, which we're talking about now.

Mr. DIXON. We're quite concerned with the shield law question. I mentioned the press power that would be created if we had, on top of the already strong restrictions on libel suits, flowing from the New York Times against Sullivan doctrine and the later cases added to that, some shield legislation including defamation of character. We thought, as Justice Fortas put it, dissenting in *St. Amant*, that it would create a power of character assassination with impunity.

We are concerned, very concerned, about the interaction of our existing Court decisions, almost nullifying libel legislation, plus a shield law which would prevent getting the accurate information needed even to mount the kind of suits that are left regarding press libels of public officials.

Representative CLEVELAND. My last question really is more of a statement, I guess, than a question.

I'm disturbed by your statement, the conclusion in your statement, because it seems to me that it doesn't recognize an increasingly important part of the congressional function. I can only speak for myself, though I think I'm speaking for a good many other Members of Congress, in saying that a very important part of our job is done on behalf of constituents outside the Halls of Congress and outside of committee rooms.

The Government has proliferated at an enormous rate during recent decades, and there are hundreds of thousands of people who are meshed in the coils of Government who cannot afford a conference, or attorneys, or paid lobbyists, so they turn to their congressional representatives for help. As a result of this, many Congressmen find that a great many of their duties, a great deal of their time, a great deal of their effort, is spent consulting these agencies of the Federal Government to find out whether or not their constituents have been properly and fairly treated by Federal Government. If you take the narrow position that the Court took and you took, all of that is outside the immunity clause. I can cite you at least one case where a Congressman is now being sued for libel because he released a Department of Transportation report that indicated a particular busing company was at fault, after having an investigation showing the tires were faulty, and he's being sued for libel and slander.

If the Congressmen are going to do a good job for their constituents, I don't see how they can do a good job if you give a narrow interpretation; that their immunity is only confined to what they do in a committee room, or on the floor of the House. That is not where all of the action is, and sometimes some of the most important action is in one of these other areas that have emerged due to the proliferation of Government over the years.

Insofar as your statement doesn't reflect that, I'm extremely disappointed in your position.

Mr. DIXON. Mr. Cleveland, I'm not certain that I state in the statement exactly what you glean from it.

We are not certain what the dicta means in *Gravel* and *Brewster*, which dicta in part conflicts with dicta in the earlier case of *Kilbourn v. Thompson*.

What we were suggesting here is that the actual holdings of these two cases, on their facts, are rather innocuous in terms of their impact on the lawmaking function, or the informing function of Congress. One is a bribery prosecution; the other case impeded in no way Senator Gravel's capacity to disclose classified documents on the floor of the Senate, and to let the world know about them in that context. That case only opened up the way for a grand jury investigation as to the source of the document.

Representative CLEVELAND. Excuse me. I don't have the case before me, but didn't the Court hold that this immunity didn't apply to these congressional activities, like writing newsletters?

Mr. DIXON. That was not an issue in the case.

Representative CLEVELAND. It wasn't, but it made it pretty clear that that wasn't covered.

Mr. DIXON. In the *Brewster* case. That was what we call dicta in the case. That sometimes makes them long and hard to read, because the holding can be very simple and succinct, and a large essay is then tacked on, which may or may not foreclose or predict the future.

We were testifying, we were responding in our statement, to what we thought were the actual holdings on the facts at issue in the *Brewster* and *Gravel* cases; bribery in one case, and grand jury investigation of the source of documents disclosed on the floor of the Senate in the other.

Representative CLEVELAND. I have no further questions.

Chairman METCALF. Mr. O'Hara.

Representative O'HARA. No thank you, Mr. Chairman.

Chairman METCALF. Mr. Dellenback.

Representative DELLENBACK. Thank you, Mr. Chairman.

We appreciate your testimony, Mr. Dixon. It's been helpful to me.

Let me be sure, if I may follow a little bit, on what you said in your statement that Mr. Cleveland and the chairman had been pursuing, because I want to be sure that I really do understand what you say here.

On the bottom of page 21 of your statement, you make the statement that I gather you now still stay with, only the emphasis is being put on something different.

You said: "As a constitutionally defined immunity, the Speech or Debate Clause itself cannot, of course, be expanded by legislation."

I gather what you are saying to us there is that you can't by legislation effect directly what is in the Constitution. It seems to me that's a legal axiom.

Mr. DIXON. Yes.

Representative DELLENBACK. The Constitution says something. If you're going to amend the Constitution, you must amend the Constitution, and you can't amend the Constitution by legislative act.

Mr. DIXON. Yes; I would agree with that.

Representative DELLENBACK. But then you are going on and saying, "On the other hand, as the Court noted in the *Brewster* case, the practical effect of an expansion of congressional immunity could be accomplished in some areas by enactment of statutes. . . ." You're saying there can be an expansion of congressional immunity in some areas by enactment of statutes.

Is this a correct interpretation of what you said?

Mr. DIXON. Yes.

Representative DELLENBACK. It seems to me that both of them, statements you have now interpreted, in light of your further comments, are true, then I would agree with them.

Am I interpreting them correctly?

Mr. DIXON. I believe you are.

For example, regarding the second statement—that the practical effect of an expansion of congressional immunity could be accomplished in some areas by enacting statutes which exempt Members of Congress—we have hypothesized there a situation where a bribery statute is drawn very narrowly to cover 15 specified acts, and no act regarding the lawmaking function of Congress is specified.

Representative DELLENBACK. I don't know as I understand your words "practical effect," or why you are emphasizing that, because you cause me to stumble a little bit when you talk about it in terms of practical effect.

Is it not true, are you not saying that the Constitution establishes a certain base relative to immunity. You can't give it a constitutional protection by legislation because legislation is different from a constitutional provision, but you can extend immunity by a properly drawn, properly enacted piece of legislation.

You're not saying that the constitutional speech and debate clause, for example, is both the base and the ceiling to immunity? Truly, you're not saying that?

Mr. DIXON. We were not trying to state that. The paragraph has to be read in its entirety, I believe, to get the full meaning of it.

Representative DELLENBACK. Is it a lawyer's natural caution that you say "practical effect," or are you meaning something more than that?

Mr. DIXON. I believe we could delete the word "practical" and lose nothing at this point.

Representative DELLENBACK. You can say, "The effect of an expansion of congressional immunity could be accomplished in some areas by enactment of statutes."

If that's what you mean, then I'm with you. So long as you're not seeking to define "effect" by the word "practical" there, which then, I do not agree.

Mr. DIXON. That is not the intent.

Our dialogue puts me in mind of an example, which may not be wholly apt, but which may be relevant.

In support of its congressional investigatory power, Congress years and years ago passed an immunity statute that a witness could not be prosecuted in any court, Federal or State, for material, words, documents, given to a congressional committee.

As worded, the statute was too narrow, actually, to overcome the fifth amendment privilege against compulsory self-incrimination. But

it did apply in the case where a witness voluntarily testified, and then a State sought to prosecute him, based on his testimony. In *Adams v. Maryland* the witness pleaded the congressional immunity statute, and prevailed, the Court saying, in effect, that in support of its congressional power of investigation, Congress may remove the hazard of criminal prosecution at a State level, in order to produce full cooperation in a Federal hearing.

That was an immunity conferred by Congress in support of the national lawmaking function, which adversely impinged on the State law enforcement function.

Representative DELLENBACK. So we then are in agreement that legislative immunity can arise either out of language which is itself already directly in the Constitution, most notably the speech or debate clause, or in certain instances, it can be done legislatively over and above the speech or debate clause.

If that is correct, may I look for just a moment with you at the speech or debate clause itself?

One of the great excitements and responsibilities and/or opportunities, that come with a lawyer's moving from a situation where he is involved in the practice of law to the situation where he is involved in the creation of legislation, is a change from having as your only guide the interpretation of what the law is to the situation of moving to what the law ought to be. So we are concerned about both of these.

But may we look for just a moment as to what the law is when we deal with the speech or debate clause? How broad do you interpret it, you yourself, to be, in the form of application to situations that haven't yet arisen?

I'm not asking for an analysis of the seven cases. I'm asking for what you would tell us that speech or debate clause really means to you.

As a reference, so that you may understand the base on which I ask the question, prior witnesses faced with that question have said, in their interpretation, the speech or debate clause is a very broad clause, that it means much more than the legislator rising, saying some words, debating with his opponent and sitting back down again.

Senator Ervin, by whose opinion, of course, you're not bound, in effect, equates speech or debate with legislative activity. Justice Goldberg, while he didn't quite go that far in the beginning of his testimony, said, no; he did not equate it with it. At the conclusion of his testimony, after we talked about it for awhile, he came very close to saying yes; speech or debate, in the modern context, as opposed to when the Constitution was written, that living document with the expandable joints, as you used the phrase, really is a very broad phrase in 1973.

What would you tell us, shaking loose for the moment—not contradicting, but shaking yourself loose from the opinions that the Court has written already, as a lawyer with fine qualifications—how broad a phrase is that?

Mr. Dixon. That, Mr. Dellenback, is a very broad question. I think we all, especially those who are trained in law, are more comfortable defining by negation, what something is not, in order to get down to the core of what it is, rather than trying to turn it around and say what it is right at the outset.

Representative DELLENBACK. Of course, we're also more comfortable to be able to look at, not dicta, but a hard decision which is right on point, the white horse case, and say, "That's clearly what it means." We don't have any case. We don't have horses at all. We don't have any quarter horses, or pure bred, or any kind in this particular area. We're asking beyond that what it is that you think it means, how broad a phrase, really, is it?

Mr. DIXON. This requires probably a research project, which might wind up maybe with a proposed code of procedure for Congressmen or committees, both institutional and private. This code might catalog all the activities that the committees are involved in, catalog all the activities that Members of Congress get involved in, and then try to draw conclusions in terms of those acts which are subject to protection, i.e., immunity from being questioned in another place, and those which are not.

I could be wrong on this, but my impression is that the great variety of activities at the periphery of the lawmaking process, perhaps called "errands" by the Supreme Court in *Brewster*, are seldom challenged, because neither a civil claim arises in a plaintiff, nor any grand jury interest arises. There being little guidance on this in detailed case law on how to protect Congress, and little guidance perhaps expected in the future, because very few cases are brought and several are criminal, we would probably have to fall back on some statement such as the following: If the activity vitally affects the Member of Congress in his lawmaking activity, in the broadest sense to include informing his constituents in matters of public interest, then it perhaps is a candidate for inclusion in the speech and debate clause.

My greatest reservation would be on how far we push the informing function.

Representative DELLENBACK. Are you willing to push it in the other direction to its origin?

Mr. DIXON. In terms of gathering information, other than classified or privileged, yes. I think we have had, and I think we will continue to have, a broad information gathering function by the Congress, backed up on occasion by subpoena process by Congress, as you know.

But I do worry about cases like *Brewster* and *Johnson*, because to me that gets too much involved in a type of activity which I don't think Congress applauds at all—bribery and conflict of interest. I know it does not applaud it, and the country does not applaud it. Therefore, we all agree it should be repressed.

Representative DELLENBACK. Justice Goldberg made an interesting comment on both *Brewster* and *Gravel*. He said this is not a case of interpretation of the Constitution, that those were cases of interpretation of statutes, as he read them, that were, of course, based on, bottomed on the Constitution. But he said that was not a direct case of interpretation of the Constitution.

Anyway, without chasing a minutia of details—

Chairman METCALF. He certainly did, and I think it should be brought out, Mr. Dixon, that there is a statute involved in each of those cases, and there are rules of the committee, and rules of the Congress, and certainly those matters should be taken into consideration as well as the clause of the Constitution.

Mr. DIXON. That's a very vital point. The constitutional issue in *Brewster* and *Johnson* is intertwined with a congressional act.

Representative DELLENBACK. That is right, and that point was made clearly in the dialogue we had with Justice Goldberg, and that's a very important point, I think.

Mr. DIXON. I would agree that's an important point.

Representative DELLENBACK. The interpretation of the speech or debate clause then, Mr. Dixon, is not just literally the way these words would be found in the normal context of speech or debate. You are not quite equating them perhaps, maybe you are eventually, with legislative activity, but clearly you interpret that section, article I, section 6, as meaning something in the gathering of information leading up to legislation, and something after legislation, or in connection with the process, that is, the legislator communicating with his constituents, so that there is a greater reach to the phrase than just the normal technical, narrow "speech or debate." Am I correct?

Mr. DIXON. In general, that is true. The point where an immunity problem arises under congressionally enacted criminal statutes—and they are *congressionally enacted* criminal statutes—is when a Member gets involved in some of these activities. That's a different question.

Representative DELLENBACK. Ducking legislation for the moment and looking just at the constitutional immunity, do you interpret that not as a basis for legislative action, although that's something else, but just by itself, as giving immunity for certain things that are involved in the whole legislative process?

Mr. DIXON. And are needed to make the process effective as a process perhaps.

Representative DELLENBACK. Legitimate legislative activities.

Mr. DIXON. It could be that what the Court really meant in *Brewster*, by the oft quoted "errand" phrase and the word "political," was to simply indicate that they viewed as being still subject to prosecution, those activities of a reelection nature which might trench eventually on the congressionally enacted Corrupt Practices Acts.

Representative DELLENBACK. May I shift now beyond the Constitution to the matter of legislation?

What sections of the Constitution—and we recognize the whole Federal Government is one of delegated powers—delegate to the Congress the power to enact congressional immunity legislation, over and above and beyond the Constitution itself? Where do you look for the delegation of power that gives the Congress the power to do anything?

Mr. DIXON. Of course, I'm loathe to try to advise Congress in detail on how it should devise legislation.

Representative DELLENBACK. I'm not asking you with regard to legislation, what we should do. I'm just asking you where do you find the delegation of power in the Constitution that lets us do anything at all beyond just looking to the technical points of the Constitution itself, because we have no power to legislate unless we define the delegation of powers.

Mr. DIXON. As we all know, Mr. Dellenback, the congressional power to legislate derives expressly from grants in the Constitution or from the implied powers doctrine, and the implied powers doctrine is very large, and very productive, and very common in our constitutional history.

In the precise context of Congress as an institution, perhaps the best examples that are given are those associated with the power of investi-

gation, and the associated contempt power, to make the power of investigation effective. These powers are derived by example through the British Parliament—the Founding Fathers arguably viewing them, we assume, to be implied in the very nature of defining a legislature—and, in part, are sustained in term of logical necessity to make the lawmaking powers effective.

You hear the question raised here as to what extent the implied powers doctrine regarding the congressional power of investigation, and congressional power of contempt, could apply to create a power in Congress to define immunities other than those based on the speech or debate clause. There are some analogies to point to, although I would not know how far they could be carried.

Representative DELLENBACK. In addition to article I, section 5, which deals with certain matters about the powers of each House, judging, qualifications and determining rules of procedures in punishing Members, there is section 6 with its speech or debate clause, with its privilege from arrest.

Again I set up Justice Goldberg, not as an authority on this, although I think he's a very able man. But I set him up, as he made the point on any actions you take, he also leaned very heavily on three other authorities that he thought were in existence. One was article I, section 1, which says in the simple leadoff: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House."

Now he read that very broadly in his interpretation, and said since all legislative powers are vested in the Congress, the Congress then, under the necessary counter clause, in article I, section 8, has great power to enact what legislation is necessary to protect that legislative power, and it's partly in a leaning on those two clauses, not as corollary powers that lean on and attack to some other basic powers that you find under article I, section 8 of the normal listing of powers, but the necessary and proper clause, under which section 8 ended, and coupled with that in section 1, he leaned on those two to say the Congress has great broad power to deal with immunity legislation.

He also looked to the general power that the Chairman has referred to before, the power to enact criminal legislation, although, of course, you have to find the field of criminal activity with which we can deal under someplace else in the Constitution.

Chairman METCALF. That's under section 8.

Representative DELLENBACK. But it's not a general power to deal with criminal legislation per se. It's only dealing with specific powers.

Chairman METCALF. I think, in article I, section 8, the definition of define and punish offenses against the law of nations is within the delegation of the power of Congress. Isn't that right, Mr. Dixon?

Mr. DIXON. I can't recall the case, but it seems to me the principle has been resolved that Congress has power to enact criminal legislation in support of all those powers and duties listed in section 8.

Representative DELLENBACK. If the power to enact criminal legislation, as I gather it, is in connection with the powers that are itemized in article I, section 8. I have trouble finding specific language.

Chairman METCALF. The only powers, as I understand it, that are itemized as far as criminal legislation are felonies and piracies on the

high seas, and so forth. But, as a result of that general power delegated, we have had a whole broad spectrum of Federal criminal law.

Mr. DIXON. Yes, Mr. Chairman, but the peg is the commerce clause, or the tax clause, the bankruptcy clause, and so on.

Representative DELLENBACK. I think the dialogue is very helpful to me Mr. Chairman, in getting the basic things straight. I have trouble finding it. I've read and reread article I, section 8. Maybe I'm missing something. There is no phrase there in which it says, "Congress shall have power to enact criminal legislation," in general.

Chairman METCALF. No; not at all.

Representative DELLENBACK. It merely says it has power, for example, dealing with borrowing money on the credit of the United States, whereupon we then have the power to enact all sort of criminal legislation in furtherance of that power to borrow money on the credit of the United States.

Chairman METCALF. But you're talking about the necessary and proper power to carry into execution the powers of article I, section 1.

Representative DELLENBACK. Article I, section 8.

Chairman METCALF. Yes; I know. Article I, section 1, says that we should have legislative powers, and then we go through the Constitution and find out what powers are delegated.

Representative DELLENBACK. Let me then ask this last question.

Representative CLEVELAND. Excuse me. Let me just ask a question. We're all going back to law school.

Isn't it true that we also have some power in that we have something to say about the delegate, about the scope of the court's jurisdiction? Isn't there something in the Constitution?

Chairman METCALF. Absolutely.

Representative CLEVELAND. In fact, also, as I understand the situation, we also have some powers in the Constitution that would say they can take their cotton picking hands out of this area altogether. Isn't that true, Mr. Dixon?

Mr. DIXON. I would not want to say an unqualified "yes" to that statement.

Representative CLEVELAND. Am I correct in saying somewhere in the Constitution—and I'm not one of these scholars who can give you article and clause—but isn't there something in there that says we have something to say about the jurisdiction of the courts, the Federal courts?

Mr. DIXON. There are perhaps two things to be said to that.

First, regarding the U.S. Supreme Court, it's original jurisdiction was defined by the Constitution under two headings: Where a State shall be party, or a consul or ambassador is a party.

The appellate jurisdiction extends to the whole range of Federal authority described in a different section, but then in the appellate jurisdiction clause there also is the additional phrase "subject to such Exceptions."

Representative DELLENBACK. Article III, section 2, "with such Exceptions and under such Regulations as the Congress shall make."

Mr. DIXON. Precisely.

Representative CLEVELAND. Actually, Congress could say in areas involving legislative immunity, there would be no appellate jurisdiction, and the ballgame would be over.

Isn't that a fairly correct statement, particularly to someone who's so strict in his interpretation of the Constitution as you are?

Mr. DIXON. Again, I don't say unqualifiedly "yes."

Let me explain that response, if I may.

It is true that back in the Civil War period, when the Supreme Court wished to duck the issue of deciding the constitutionality of reconstructed legislation, it did go along with a special habeas corpus revision statute which pulled back from the Supreme Court the *McCordle* case already there, in order to get it away from the Court. The Court went along with it and allowed the pullback of the case. That's a long ways back in our history. It occurred in a particular political context, the Reconstruction period.

Justice Douglas, a few years ago, in a case, *Glidden*—I can provide the citation for the record—but Justice Douglas said that he thought that the Court would not abide by the *McCordle* precedent today.

Justice Roberts, in an article in the American Bar Association Journal in 1944, doubted the continued validity of the *McCordle* precedent, the reason being, of course, that the *McCordle* precedent raises a spectre of a power in Congress to strip the Supreme Court of all important activity, and thereby maybe run counter to the overall spirit of article III, of which the exceptions clause is only a part, that there be an independent judiciary in our three-branch system of the Government.

That's a long response, and I apologize. The citation to the Justice Douglas caveat is *Glidden v. Zdanok*, 370 U.S. 530, 605 n. 11 (1962).

Representative CLEVELAND. Excuse me just a minute.

I'm not interested in any law review articles and caveats.

You just got through saying that the dicta in the *Gravel* and *Brewster* cases didn't bother you, although they bothered me, when they speak about the representative functions—the writing of the newsletter, the doing of a job for constituents—as not a legislative function. They just consider that something political and an "errand boy" function.

That didn't bother you, but it bothered some Congressmen. But it didn't bother you, because it's dicta, so don't go quoting the law review articles, which is sort of superdicta.

Representative DELLENBACK. May I ask one question?

Chairman METCALF. Yes.

Representative DELLENBACK. This has been very helpful to me. We've dealt now with Mr. Dixon's feeling about the interpretation of the speech or debate clause, and gotten some very helpful comments on that that I think are valuable and are anything but an absolute strict construction of the phrase "Speech or Debate," and that is very helpful. We have also dealt with the realization that there are sections of the Constitution which are the basis for congressional power to enact criminal legislation.

Mr. Dixon has made it clear he's talking about reading the Constitution within its four corners, and he's talking about some of the implied powers, as well as some of the literal powers.

The last question I would ask is: How far beyond the speech and debate clause do you think the Congress can properly go in legislatively providing for congressional immunity?

Now you've given us in your testimony one limitation, namely other constitutional provisions. If we try to enact something that was legislative in nature that violated other constitutional protections for individuals, we would then, by legislation, be coming in conflict with the Constitution.

But I am wondering, as I have read what you said on that, to what degree we are dealing with the matter of rights, and to what degree we are dealing with the question of remedy and forum. In other words, if we, under article I, section 6, speech or debate which says, in effect, speech or debate in the Congress, we shall not be questioned in any other place, for these things.

If we have something that properly falls within speech or debate, and we provide by statute not that there is immunity from prosecution by this violation, but we provide that it shall be tried only within the Congress, are we in violation of the Constitution, in your opinion at that point?

MR. DIXON. Your premise, Mr. Dellenback, is that no other interest is implicated in terms of some private interest, as allegedly present in *Dombrowski*.

Representative DELLENBACK. I'm giving you a general question, rather than going back to the specific case, because I'd have to go back and read *Dombrowski* to know whether that applied.

If I read you correctly, you said that there is, of course, a limitation on what we can do legislatively. We cannot do in legislation something that is in conflict with another part of the Constitution. I'm with you. I agree.

But, if we, by legislation, provide that the only tribunal where something else can be properly tried is within the Congress itself, rather than in the courts, and we expect it will be accounted for within the Congress itself, we're dealing then, you see, with a matter of remedy, and a matter of forum, and we are not trying to contradict something else in the Constitution as a matter of right.

Would you quarrel with the Congress' power to provide that this cannot be tried in the courts, but can be tried within the Congress by our peers?

MR. DIXON. Let me in response to that say two or three things:

First—and I just say this and lay it aside—I find it hard to hypothesize at the moment kinds of conduct which would give rise to the desire to discipline a Member, which would not involve third parties in one way or the other, and thereby implicate other interests, as are the facts actually in the *Johnson*, *Brewster*, and *Gravel* cases.

However, laying that aside, and assuming a situation where third party interests are not implicated, then it is simply that Congress wants to discipline a Member for something he has done or has not done. It would then be within the clause in article I, section 5, which I would point to, regarding congressional discipline of Members. That clause was involved in the *Adam Clayton Powell* case, as you know, and the *Adam Clayton Powell* case was subjected to judicial review. During the course of that review, a restrictive reading was given by the Court of the grounds for discipline under article I, section 5, and the three headings specified there.

Representative DELLENBACK. But there was no legislation in existence at that time, whereby the Congress had said the forum, the tribunal, shall be the Congress.

Mr. DIXON. That does raise the next question, as to whether Congress, by advance legislation, could have precluded the Supreme Court ruling in the *Adam Clayton Powell* case, construing as a matter of constitutional construction the article I, section 5 clause.

Representative DELLENBACK. We won't chase that, Mr. Chairman.

Chairman METCALF. I think that's a very interesting question, because the Constitution provides that all crimes should be tried by jury, and we say, "OK, if a Senator or a Congressman commits a crime, he can only be punished by the tribunal." That was mentioned in these cases, and the Supreme Court showed some consideration for Members of Congress, that we could do without in that case.

But suppose we said that a Senator or a Congressman, for a crime such as bribery, or any of the related crimes that might be associated with selling a boat, or distributing favors, should be tried only by the tribunal before Congress, not by jury! Now, what would happen then? There's the kind of conflict that you were talking about—a conflict of two constitutional sections.

Mr. DIXON. That's a good question, Mr. Chairman. Let me respond in this way, by suggesting a direct analogy to the implied power of Congress to punish directly by contempt a person who ignores congressional process, rather than by the congressional statute process, making it a misdemeanor. I believe it is—we can check that—to be in contempt of Congress, and have the matter handled by a court process.

There are not, as yet, any constitutional precedents that tell us that Congress lacks a power to punish even a private citizen, by the process of direct contempt, without jury trial, without much of anything else except a vote by the body of Congress concerned.

The last instance of that was the *Jurney* against *MacCracken* case in 1935, when in the course, as I recall this, of an airmail contract fraud investigation, an attorney ignored a subpoena duces tecum and burned relevant papers on the roof of the National Press Building. For that he received a direct contempt punishment, and served, I believe, at least 10 days, maybe more, in the District of Columbia jail.

In that kind of a proceeding, there is no due process as we conventionally envision it, no real hearing process. It's sort of an immediate slap on the wrist.

So, by analogy, I would say if *Jurney* against *MacCracken* stands unreversed, under the power of Congress to punish directly by contempt, without any judicial process at all, that would certainly suggest by analogy some power of Congress to do as you suggest, by precedent.

Chairman METCALF. Congressman Dellenback has raised some very difficult questions.

Representative DELLENBACK. May I just ask one question, and ask the witness to give us information on this—and I won't chase the question at this time.

I think it would be helpful to us, because we are asking you in some of these questions, to answer off the top of your head, and that's a little bit unfair.

I would hope, Mr. Chairman, that we might extend to the witness the request that he expand on any of his answers to these questions, that this might be helpful to us, and his including anything he might be able to give us in commentary on the limitations of our power

legislatively to deal with this question of immunity, over and above the Constitution.

Chairman METCALF. I would hope that he would revise and extend his remarks to qualify some of the flat statements he made, that I don't believe he really meant.

[The following material was subsequently submitted to the committee:]

DEPARTMENT OF JUSTICE,
Washington, D.C., April 23, 1973.

MEMORANDUM FOR HON. LEE METCALF, CHAIRMAN, JOINT COMMITTEE ON
CONGRESSIONAL OPERATIONS

Re: Discussion of the Power of Congress to Modify the Scope of Congressional Immunity by Legislation.

As I noted in my written statement and oral testimony before your Committee, the Speech or Debate Clause on Article I, Section 6 and the Supreme Court decisions which interpret it cannot be modified by legislation. There was apparently some misunderstanding as to the meaning of a cryptic sentence contained in the conclusory section of my statement, which was intended only to convey this thought. As I also indicated in my testimony, there would seem to be some room for legislation on congressional immunity, possibly expanding to some degree the immunity already conferred in the Speech or Debate Clause.

For example, the effect of immunity could be obtained with respect to many federal criminal or civil statutes simply by omitting Members of Congress or their aides from the class of people covered by the statute. Presumably, no separate constitutional power is required to effect immunity in this manner. The power to enact a statute must include the power not to enact it, or to omit from its coverage certain classes of individuals. By use of the federal supremacy doctrine articulated in *Adams v. Maryland*, 347 U.S. 179 (1954), Congress may also have power to immunize Members of Congress regarding their official acts from state civil or criminal proscriptions.

Other bases for legislation expanding congressional immunity have been suggested. In his testimony before your committee on March 27, 1973, former Supreme Court Justice Arthur J. Goldberg suggested that certain provisions of Article I of the Constitution, including section 1 (vesting "[a]ll legislative Powers herein granted . . . in a Congress") and section 8 (necessary and proper clause), granted to Congress the necessary authority to modify by legislation the scope of congressional immunity. The theory would be, as in the case of the implied power of congressional investigation, that the grant of legislative power confers also the power to make such reasonable provisions as may be necessary to effectuate the legislative power. Of course, such a theory cannot be carried too far because the extensive specification of powers by the Founding Fathers logically has some limiting effect on the implied powers doctrine. For example, the limited wording of the Speech or Debate Clause, where the Founding Fathers expressly considered the scope of immunity to confer in criminal matters, would make it difficult to argue that Congress could immunize its members against all criminal prosecution, or grand jury inquiry. Significantly, in the analogous area of Executive privilege, the President has never asserted Executive privilege in regard to grand jury inquiry into the Watergate matter. He pledged full cooperation to the grand jury.

The draft bill proposed by Senator Gravel sought to expand the immunity of Members of Congress and their aides by stripping the federal courts of jurisdiction in all criminal proceedings which relate to a "legislative activity" as defined in the bill. Although there are precedents for Congress removing certain matters from the jurisdiction of the lower federal courts, and even from the jurisdiction of the Supreme Court (*Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869)), this approach is not without constitutional problems. Notably, it goes beyond what the Executive has ever claimed for itself. It may run afoul of the separation of powers principle by permitting undue interference by the legislature in the affairs of the judiciary. There is a discussion of the problems involved in statutory narrowing of federal court jurisdiction in my own book, *Democratic Representation* (Oxford University Press, 1968), at pages 387-392.

Whichever approach to legislation is chosen, it is clear that the power of the Congress to expand congressional immunity is not unlimited. Where an asser-

tion of immunity conflicts with constitutionally based principles, the legislative grant of immunity may have to give way. Thus, in situations such as occurred in *Dombrowski v. Eastland*, 383 U.S. 82 (1967), where the chairman and counsel of a Senate subcommittee were accused of conspiring with state officials to unlawfully seize property and records belonging to the petitioners, constitutional rights (in this case, the fourth amendment right protecting individuals against unreasonable searches and seizures) may be involved. Statutory immunity from civil suits brought to enforce such rights might not be recognized by the courts.

Legislatively granted immunity, if overly broad, might also run into conflict with separation of powers principles. Thus, if a Member of Congress is immunized from judicial restraint in connection with activities interfering with the operation of the executive or judicial branches, his claim of immunity may not be upheld. Thus, in an instance such as occurred in *United States v. Johnson*, 383 U.S. 169 (1966), where evidence was introduced that a Congressman had sought to influence the Department of Justice in carrying out its executive responsibilities, a separation of powers argument might be interposed against the legislatively asserted immunity.

The major restraint on legislation expanding congressional immunity probably turns not on the Constitution, but rather on the policy question of how far and to what extent the Congress wishes to place its membership beyond the criminal and civil laws to which all other citizens are subject. Officials of neither the Executive nor the Judiciary currently possess immunity from prosecution for criminal acts, even where the acts in question relate to their official functions. See, *United States v. Manton*, 107 F.2d 834 (2d Cir. 1938) (prosecution of former judge from the Second Circuit of Appeals) and *Fall v. United States*, 49 F.2d 506 (D.C. Cir.), *cert. denied*, 283 U.S. 867 (1931) (prosecution of former Secretary of Interior).

In considering legislation to expand congressional immunity, Congress may also wish to consider the possible ramifications of such action on the scope of analogous immunity for officials of the Executive and Judiciary. With respect to all three branches of Government, there are strong policy reasons for not extending immunity beyond that essential for the proper functioning of our system of government. There may also be a social cost in terms of the individuals who are harmed by the immunized actions of officeholders or other high government officials.

In short, many considerations must be weighed in order to achieve a proper balance of the legitimate but conflicting instances in this field.

ROBERT G. DIXON, Jr.
Assistant Attorney General
Office of Legal Counsel.

Representative DELLENBACK. I would be interested at least in that, and whether you may care to request of him. But if we can get some commentary on what the limits might be, if any at all, whether they extend to both civil and criminal rights, I think this would be helpful as we go forward from here.

Thank you, Mr. Chairman. I apologize.

Chairman METCALF. Congressman Cleveland.

Representative CLEVELAND. Mr. Chairman, I ask that, along with my dialogue and the witness', I can have the precise language of the *Gravel* and *Brewster* cases inserted in the record, and Madam Reporter, for your information, I hand these to you. They are found on page 241, and on pages 295 and 296, of the report of the Joint Committee on Congressional Operations Identifying Court Proceedings and Actions of Vital Interest to the Congress, dated December 1972, which I mark here, and I'll give them to you. These are the so-called "errand boy" sections of those opinions that you don't take very seriously—and I take rather seriously.

Mr. DIXON. Mr. Cleveland. I wouldn't say I didn't take them very seriously. I thought they're unpredictable and perhaps not to be overly stressed.

Chairman METCALF. Thank you very much, Mr. Dixon, for your appearance here. Unless there are other questions, without objection, that material will be included in the record.

[The above-mentioned material is as follows:]

Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States v. Doc. 455, F. 2d 753, 760* (CA1 1972.) *Gravel v. United States*, 408 U.S. 606, 625 (1972)

It is well known, of course, that Members of Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however, appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, supra, at 204, or things "said or done by him as a representative, in the exercise of the functions of that office," *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). *United States v. Brewster*, 408 U.S. 501, 512-513 (1972)

Chairman METCALF. Thank you very much, Mr. Dixon. I think that we've had a useful dialogue here, and I thank you for coming up and being so patient. You've waited so long.

Mr. DIXON. Thank you. I've enjoyed spending my fourth anniversary with you.

Chairman METCALF. Stick around. You'll spend some more anniversaries with us.

Mr. DIXON. Thank you.

[The statements referred to at page 232 follow:]

STATEMENT OF JOHN P. SAYLOR, A MEMBER OF CONGRESS FROM PENNSYLVANIA

Legislative immunity encompasses more than the protection of Members of Congress in pursuit of their duties. Ultimately, it guarantees the people's right to know what their government is doing. We are the instruments to serve this purpose.

The framers of our Constitution realized that Members of Congress could not effectively function without the privilege of legislative immunity. However, our Founding Fathers did not invent it. The concept and the right originated in 1399, when members of the British House of Commons began fighting for the idea. The immunity developed as a privilege asserted by the Parliament against the prerogatives of the King, in order to fulfill its functions as an independent branch of the government. In our day, what portion of the Constitution is more crucial to preserve?

The battle raged in England until 1688 when the first, unequivocal recognition of legislative immunity for Parliamentary speech was adopted in The Bill of Rights granted by William and Mary which stated,

"... that the freedom of speech, and debate or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

In colonial America, the right was recognized in the various Assemblies; the colonists correctly claimed for themselves as individuals and for their instrumentalities of government, the rights belonging to all Englishmen. Therefore, it was logical for the Articles of Confederation to contain a legislative immunity clause which read, "... Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . ."

The Constitutional Convention of 1787 adopted this clause without heated debate or dissent; the only discussion concerned its rewording. As adopted, the clause reads, "... and for any speech or debate in either house, they shall not be questioned in any other place . . ." Thomas Jefferson explained the necessity for this fundamental prerogative when he petitioned the Virginia House of Delegates in 1797, to wit:

"... that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was part of the common law, adopted as a law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance of coercion of the coordinate branches, Judiciary and Executive."

Like all true constitutional governments, our Founding Fathers interpreted legislative immunity as a protection against interference with the individual legislator. The framers of the Constitution believed that it would best serve the interests of all people if Members were permitted unlimited freedom of speech or debate.

The beauty of our Constitution has been its ability to withstand all the tests of time. Its flexibility has permitted contemporary interpretations to guide our country through 200 years of ups and downs. Today, it is imperative that the Constitution be interpreted in favor of the people and their representatives. Without such interpretation, the Constitution will crumble and Congress will become an anachronism. Legislative immunity must, therefore, be an absolute shield against all outside interference with the legislative process. It is an essential condition for the existence and full development of the legislative process. The elimination of outside intervention safeguards the rights of the people and the proper representation of the people hinges on legislative immunity.

Representatives must be able to secure information on the governing process from any source available. If we relied solely upon executive branch information, the people and the Congress would be uninformed or misinformed and at the mercy of the executive.

My legislative immunity must not be judicially threatened or harrassed because I have upset the bureaucratic appletart or stepped on someone's toes. No one man or institution has the right to deny the citizens of the 12th Congressional District of Pennsylvania the proper representation which they deserve.

The less Congress can say and do, the further away the government gets from the people. The elimination of Congressional freedom of action would terminate the flow of information to the people. I do not need to tell you who will fill the void left by absence of congressional power. If Members of Congress are gagged in order to assure governmental stability, then we, in effect, will have created an executive dictatorship. Six hundred years of progressive representative government through a system of checks and balances will be obliterated. If we allow that to happen, Congress will be no better off than the British House of Commons under Richard II in 1399.

To interpret this clause of the Constitution in its strictest sense would not be popular representation—it would be puppet representation. I caution this Committee and the people of this Nation—what we do not know, what we cannot say—will hurt us! We are not only fighting to save legislative immunity, we are fighting to save representative government.

STATEMENT OF ANTONIO B. WON PAT, MEMBER OF CONGRESS, TERRITORY OF GUAM,
IN SUPPORT OF CONGRESSIONAL FREEDOM OF SPEECH

I heartily endorse the underlying purpose of the hearings before the Joint Committee on Congressional Operations, which is to clarify and solidify the immunity from questioning and prosecution of Members of Congress for their utterances in debate and performance of their other vital legislative activities.

The Constitution of the United States, Article I, Section 6, clause 1, provides that, "... for any Speech or Debate in either House, the Senators and Representatives ... shall not be questioned in any other place." The preconstitutional history of this clause clearly demonstrates that the framers of the Constitution intended to protect the Members of Congress from harassment and prosecution by the Executive Branch in response to unfavorable comments made by Members in Congressional debate. The framers relied upon lessons learned from English Parliamentary history. Efforts by the King to stifle Parliamentary debate by jailing and prosecuting Members of Parliament resulted in revolution, and renewed assertion of the Parliamentary privilege that "... the Freedom of Speech, and Debates or Proceedings, ought not to be impeached or questioned in any Court or Place out of Parliament." These lessons were especially bitter to James II, who lost his throne, and to Charles I, who lost his head, after tampering with the rights of Members of the House of Commons and House of Lords to speak their minds freely on the floor of Parliament.

Such was the determination of the framers of the Constitution to avoid violence and bloodshed over the Congressional right of free debate that the Speech or Debate Clause was adopted without discussion or dissenting vote. And to their credit, no such blemish on the history of the United States has ever erupted. Yet, even though acts of violence between branches of the government are completely foreign to the United States, the protection of Congressional free speech should be no less scrupulously preserved.

For this reason I favor legislation which would redefine the Speech or Debate immunity, in light of recent Supreme Court decisions which seemingly allow the President to impede by indirect methods the ability of Members of Congress to perform vital legislative activities. While a Congressman is still free to say what he pleased in Floor debate and in committee, the Government can harass the sources of his information, and those who attempt to privately republish a Congressman's utterances for wider circulation. While a Congressman's legislative activities are still immune from question, his "promises" to perform such activities are not.

I would also like to urge that the proposed legislation make it clear that a Delegate to Congress and a Resident Commissioner enjoy the same Speech or Debate immunity as a Representative in Congress. Although the Constitution does not clarify this point, it should be noted that except for the right to vote on the Floor of Congress, a Delegate and Resident Commissioner possesses practically every other privilege, and bears every other burden and responsibility, that a voting Member does.

With great commendation to the purpose of these hearings, let me express the hope that from this forum will emerge meaningful disclosures, resulting in well-wrought and purposeful legislation on a subject vital to every Representative, Resident Commissioner and Delegate to the Congress of the United States.

STATEMENT OF FRANK ANNUNZIO, MEMBER OF CONGRESS FROM ILLINOIS

Mr. Chairman, it has become the duty of the 93d Congress to insist that encroachment upon its constitutionally prescribed responsibilities by the judicial and, particularly, the executive branches of our Government, be once and for all stopped. Executive aggrandizement of power has been increasing for over five decades, and Congress must and will resist.

Today, however, I wish to bring to the attention of the committee a new danger to the power and independence of the Congress poised when the Supreme Court handed down opinions in the cases of *United States v. Gravel* (408 U.S. 606 (1972)), and *United States v. Brewster* (408 U.S. 501 (1973)). Both of these cases involve the Supreme Court's interpretation of article I, section 6 of the Constitution.

These two Supreme Court decisions have drastically eroded the concept of legislative immunity, the ability of Members of Congress to collect information vital to evaluating the performance of federal agencies, and the ability by which Members may inform the public regarding the important issues of our day.

In the case of *United States v. Brewster*, the Supreme Court decided that a Senator could be prosecuted for accepting an unlawful gratuity in return for a promise to vote a certain way. The speech or debate clause immunity protected the Senator from interrogation regarding the casting of the vote, but not regarding the agreement to cast the vote. Yet the Court did not enumerate criteria for distinguishing a vote from a promise to vote. Does this decision provide a means

by which the executive may circumvent the legislative immunity and challenge any Member's vote?

In *United States v. Gravel*, the Court held that an aide of a Member enjoys the same immunity as that of the Member himself, but what the Court gave with one hand, it took away with the other. Activities of Members and their aides in preparation for committee and subcommittee meetings are not immune when the Justice Department can allege criminal activity on the part of some third person who provides information for consideration at such meetings. If a Member attempts to republish privately the committee or subcommittee hearings for distribution to the voting public, the private publisher is not immune from grand jury questioning regarding the source of the Member's information. This would seem to me to allow the executive branch to impede the dissemination to the public of information embarrassing to the administration, through harassment of sources of such information and private publishers.

Several lower Federal court decisions, in addition, have imposed limitations on the use of the Congressional frank by Members wishing to communicate with constituents residing in areas newly added by redistricting. These courts have rejected my own contention that regulation of the use of the frank is a purely internal matter in each respective House of Congress, immunized by the speech or debate clause from interference by the courts.

In a recent court of appeals decision, on the other hand, several Members of Congress were thrown out of court with a suit to challenge the handling by the President of the Indo-China War. The court held that Members of Congress do not have standing to sue in such cases, and that the issues presented constituted non-justiciable political questions.

The most disturbing aspect of these decisions, taken as a whole, is the attitude taken by the courts regarding the role of a Congressman, in characterizing many of the indispensable services performed by Members for their constituents as "political errands" not covered by the Speech or Debate Clause immunity. These so-called errands include preparing newsletters, news releases, and delivering speeches outside of Congress, as well as assisting in securing governmental contracts and making appointments with governmental agencies. Such services may be "errands" to the Court, but they are duties to a Congressman, as much as if they were included in the Constitution. No Member hoping for reelection can neglect such vital services to his constituents, and as such, these activities are clearly as deserving of immunity from executive scrutiny as voting on legislation.

Yet the net result of these court holdings is that a Congressman may not freely inform and serve his constituency, while the President hides behind "executive immunity" and the court's reluctance to decide "political questions" to prevent legislative scrutiny of his actions. I certainly hope that Congress will now act affirmatively to prevent the apparent restructuring of the Separation of Powers into a one-way street, whereby the President and the courts remain free to act as they please, while Congress must suffer continual "pot shots" from the other two branches.

Mr. Chairman, article I, section 6, the so-called speech or debate clause of the Constitution, protects Members of Congress and their communication with the people. The exchange of information between the American people and their directly elected representatives in the Congress is "legislative activity," not mere "political errands," and is basic to the functioning of this national legislature. Without its continued vitality and integrity, we function as blind men, neither fully knowing nor fully able to best serve the needs of our Districts, our States, and our Nation.

As part of the independent and constitutionally protected third branch of government, the legislative activity of a Member of Congress is, and must remain, subject to only two forms of scrutiny: That by his colleagues in the Congress itself and that of the voters, who are the final judges and ultimate arbiters of all actions in their government.

Chairman METCALF. Our colleague, Representative Patsy Mink, was here all morning ready to testify. She is unable to come this afternoon. She has filed a statement which, without objection, will be included in the record at this point.

[The prepared statement of Representative Patsy T. Mink is as follows:]

STATEMENT OF PATSY T. MINK, MEMBER OF CONGRESS FROM HAWAII

Chairman Metcalf, Vice Chairman Brooks, and distinguished members of the joint committee, I am privileged to appear before you today.

I am happy that you chose as the subject of your hearings the broad area of the exchange of information between the American people and their elected representatives in Congress. This is certainly a multifaceted subject. It includes the right of Congress to have access to information, as well as the right of Members of Congress to inform the public about matters of concern. Further, it involves the rights of those who transmit information to Congress. If our sources of information are not protected, we will not receive information—and the American people then cannot receive it from us.

A subject of interest these days is the newsman's shield—meaning that some in the press are asking Congress for a law to protect the confidentiality of their sources. What few in the press realize is that Congress is in a poor position to protect somebody else's privilege when our own privilege to obtain information is under attack.

I am greatly disturbed by the recent Supreme Court decisions in *United States v. Brewster* and *Gravel v. United States*. In these cases, the court added unprecedented restrictions on the right of Members of Congress to obtain or disseminate information without being subject to prosecution by the Executive Branch. I know you will explore both cases in depth, and hope you can develop new legislative approaches to preserve the integrity of the article I requirement that Members of Congress "shall not be questioned in any other place."

My testimony today concerns a court case I was involved in, but in the area of obtaining information from the government. This case, known as "*Mink v. EPA*" was recently decided by the Supreme Court in a shattering blow to the Freedom of Information Act and Congress' right to know.

Briefly, the history of the case is that it arose from my efforts as a Member of Congress to protect the people of my home State of Hawaii from the possible adverse effects of an immense thermonuclear explosion the government planned to detonate in the Aleutian Islands off Alaska. This was back in 1971. When I learned of plans for the test, I was very apprehensive. The Aleutian Islands are at the crux of an immense earth fault running all along the Pacific coast through California, where it is known as the San Andreas Fault. The Aleutians are known as one of the earth's most seismically unstable regions. Many earthquakes have occurred there from natural causes. On past occasions, Aleutian earthquakes have launched large waves which travel over the surface of the ocean for hundreds or thousands of miles. Some of these have struck Hawaii's coast, with disastrous effects in terms of loss of life and property. There was no way of knowing whether a nuclear explosion of the magnitude planned for Amchitka Island might touch off a new earthquake and launch such a wave at Hawaii. From what little information I could gather, I knew that at least some scientists would not foreclose such a possibility.

Accordingly, I made efforts to block the Aleutian test by offering amendments to the authorization and later the appropriation bills involved. Similar efforts were made in the Senate, but without success. Those favoring the test challenged us to produce reliable evidence of the danger.

Curiously, 3 days before the House vote on the appropriation bill carrying some \$21 million for the "Cannikin" test, an article appeared in a Washington, D.C. newspaper, that five Government agencies opposed the test. The article disclosed in general terms the existence of a secret report to the President in which serious doubts were raised to the test. Included were the two agencies charged with protecting the environment, the Council on Environmental Quality and Environmental Protection Agency.

Immediately, I made every effort to obtain this information, by contacting the five Federal agencies involved. They refused. Then I sent a wire to the President requesting the "Cannikin Papers." Nothing was produced and my amendment against test funds was defeated on the House floor. Several days later I received a letter of reply from Mr. John Dean, counsel to the President. At that time, Mr. Dean's name was hardly a household word, but I note that recently he has achieved more prominence. Mr. Dean refused to disclose the information on which the news article was based, because "These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy."

In this matter, the executive branch refused to provide Congress with the information which it possessed, and which was necessary for Congress to have

to make an informed judgment on what Mr. Dean described as a matter vital to our national defense and foreign policy. It seemed to me that if the executive was free to conceal such data without Congress having any rights or recourse, the legislative branch was indeed an insignificant appendage of Government. Further, it was disturbing that we never would have even known of the existence of the information except for the incident of a newspaper article.

It was for these considerations that I decided to test the executive's power by instituting a court suit for release of the Cannikin papers. After discussions with several colleagues, we were able to obtain the services pro bono of the Honorable Ramsey Clark as our attorney. The suit was filed in U.S. District Court for the District of Columbia with 32 other Representatives joining me as co-plaintiffs. We sought to force release of the Cannikin papers under the Freedom of Information Act.

Ultimately, *Mink v. EPA* became the first Freedom of Information Act case to reach the Nation's highest court. I think this in itself says something about the effectiveness of the Act. But its neglect of use as an instrument for obtaining information from the executive branch was just as well. I eventually discovered. The Supreme Court's decision made a shambles of the Act and by convoluted reasoning turned it into a Suppression of Information Act.

I know the staff of the committee has available the complete text of the Supreme Court decision, so I shall not attempt to present a legal brief on it at this time. What we had sought as plaintiffs was for the courts to conduct an *in-camera* inspection of the Cannikin papers to determine whether the Government was correct in refusing to release them. The Government claimed the papers were immune from disclosure under two exemptions contained in the language of the Act. These exemptions protect the Government's right to conceal national defense information and material prepared as advice to an executive official. We contended that we sought only factual material, not advice or recommendations, and that the papers had not been properly classified as defense information by a specific Executive order as required by the Act. We urged that the court separate factual material from advice to the President and disclose it to us.

While the District court ruling was adverse, on appeal we won a Court of Appeals ruling that the lower court should examine the documents *in-camera*. At this point the Government appealed to the Supreme Court, which on March 6, 1972, agreed to hear the case. Two days after the court said it would hear the case, we won a victory of sorts when the executive branch voluntarily issued an Executive order revising its method of classifying national security documents. Henceforth, each document would be classified paragraph by paragraph to facilitate the disclosure of nonclassified portions should the need arise. Such a system of paragraph-by-paragraph disclosure was one of our objectives. Previously, by derivative classification, the Pentagon theoretically could attach the Manhattan telephone directory or a set of encyclopedias to a confidential memo and have the entire document instantly classified and withheld from the public.

Unfortunately, when the Supreme Court decision on the case was handed down on January 22, 1973, the Appeals Court was overruled on the vital issue of whether the courts had the right to inspect classified documents to determine whether information was being arbitrarily withheld. Amazingly, the majority of five justices determined that the national defense exemption of the Act does not permit compelled disclosure of the classified documents or even an *in-camera* inspection to sift out "nonsecret components." This was a disastrous blow, since no court ever examined the Cannikin papers in making this ruling. As far as the courts knew, it might have been a telephone book. They only had the word of the party involved, the executive branch, that the papers were properly classified. The word was in the form of a memo by an executive branch official, who was never questioned or cross examined in a court. So the effect was to give the executive complete freedom, under the Freedom of Information Act, to withhold data on its whim supported solely by a memo.

We in Congress are now forced to revise the Act in accordance with this decision. I believe that a careful reading of the Act will fail to support the court's conclusion that the court could not act as ruled by the Court of Appeals, but nevertheless we are faced with the reality of the majority decision. I agree with Mr. Justice Douglas' dissenting comments that "Unless Federal courts can be trusted (to read secret documents *in-camera*) the executive will hold complete sway and by *ipse dixit* make even the time of day 'top secret'."

My recommendation to the joint committee, on the basis of *Mink v. EPA*, is to consider this ruling most carefully in any actions you may take on congressional access to information. It seems to me that Congress must amend the Freedom of Information Act, and I am cosponsoring legislation with Congressman Moorhead, for that purpose.

Lastly, I would caution that in order to be a reality, any congressional right to information must be lodged in each individual Member of Congress. It is fine in theory to speak of the power of Congress as an institution, but this did me little good in my court case. The case did not present a constitutional question of executive versus legislative branch as no executive privilege was invoked. All that was involved was the interpretation of a statute passed by Congress and signed by the President. In my research on this matter, I was told by the Library of Congress that it could find no instance where Congress as an institution had ever requested information under provisions of the Freedom of Information Act. Therefore, it will be up to each Member acting in his own right if our power of access is to be regained.

Until Congress acts, I believe that we have already lost our access to information from the executive branch under the Freedom of Information Act.

Chairman METCALF. Now it is a great pleasure to welcome back to this committee a former member of the committee, former Congressman Curtis, of Missouri, who worked so hard, and has been so interested and concerned in congressional activity and congressional reform.

We certainly welcome you back to your committee and to our committee, Congressman Curtis. We are looking forward to your testimony.

We know that you have done a lot of work and a lot of study on this matter, and I'm personally delighted to have you with us.

Mr. CURTIS. Thank you very much. I'm pleased to have the opportunity, and I want to apologize for not having a prepared statement that you could follow. But I would like the privilege, if I may, to put a statement in later.

Chairman METCALF. We would be glad to have your statement. We're glad to have the summary today of your unprepared statement. Go right ahead.

Mr. CURTIS. Thank you very much.

STATEMENT OF THOMAS B. CURTIS, VICE PRESIDENT, AND GENERAL COUNSEL, ENCYCLOPAEDIA BRITANNICA, CHICAGO, ILL.

Mr. CURTIS. First, I want to commend the members of this committee who are responsible for continuing the existence of this committee, because that in itself is an achievement.

I have regretted that one of the recommendations that we had made in the previous committee to the Congress, namely, to establish a General Counsel Office for the Congress itself, had not been fully implemented, and yet in a way, this committee's existence is carrying out many of the objectives that we had in mind, and I'm quite familiar with the reports that are being filed and published from time to time by the committee in this area.

Chairman METCALF. Don't take these legal discussions that you've heard as a substitute for hiring a counsel for the committee.

Mr. CURTIS. No. But at least what you're doing is a very important thing. You are calling attention to one of the most neglected areas in the practice of law in our society, namely, the legislative practice of law.

I am happy to say that I now am in a position maybe where I will be able to implement this long dream of mine, that we do structure the study of law in our law schools, so that it is not just concentrated on what could be called the judicial practice of law, that there is, as anyone who has served in the Congress, as you all have and I have, knows there is a very important area which can be properly called legislative practice of law.

Granted, when it is not developed as a discipline and taught in this fashion, there is a tendency to think of the legislative process as wheeling and dealing, the Mao-Machiavellian school of politics, as opposed to what I know anyone who has served in the Congress realizes it really is a study and a deliberating body in its marshaling of facts and for arguments properly and fairly presented before the proper forum.

The position I am now in, in the American Bar Association, which has just recently created a seven-man committee to take a look at the teaching of law throughout the country, and I am on that committee, and this is one of the areas I hope that we will be able to point up, so that in the future the curriculum of our law schools pays some attention to this important area.

Just as an aside, there is also the very important area of the practice of executive law. Incidentally, both of these fields are taken care of, by and large, by people who are lawyers. Obviously, the better ones tend to be lawyers, because they have been trained in marshaling facts.

So I have found, being in private practice now, in the private sector, and general counsel for the Encyclopaedia Britannica Co., that there is a very important area of executive law, which is frequently referred to as "influence peddling."

But again, it honestly isn't. It's a question of locating the proper forum, and then marshaling arguments and facts, and so forth.

The Administrative Procedures Act is so essential that it be adopted by all executive agencies, so this kind of law can be practiced on an increasingly rational basis.

So we come to the situation——

Chairman METCALF. Then we have Mr. Nader, who is operating in the whole area of executive and administrative law.

Mr. CURTIS. He indeed is, and this is where we need, I think, to start a discipline. It's a difficult area. It is not easy. And I have found, and I was pleased—as I assume my predecessors here who were attorneys or law teachers, possibly are beginning to look into this area—and yet I have sat in on symposiums while I was in the Congress, and after, with lawyers, and so forth, and find top teachers of law, as well as practitioners, almost in complete ignorance of the fact that there is such a thing as legislative law according to precedent.

Take this very issue that I was listening to here about contempt, the very misunderstanding that congressional contempt is criminal contempt. It isn't criminal at all. It isn't punishment. It has to do with the orderly procedures of conducting legislative hearings and legislative business.

So this, in itself, has considerable precedence, and those of us who have tried to research congressional precedents are familiar with *Hinds'* and *Cannon's* precedents.

So neglected is this area—even by ourselves, if I may still join and be a member of the fraternity—that we have not made an issue, as we

should have, year after year that we have no precedents, that are published since about 1934.

Hopefully, Lew Deschler—I'm talking about the House—we'll sometime get Lew Deschler's precedents printed.

But as it is, the only way we can go back and research is through Hinds and Cannon, which are excellent, and then sort of hit or miss and guess where there might be precedents since 1934.

Representative CLEVELAND. Pardon me, Mr. Chairman.

As a point of information, Mr. Curtis, does the Senate have any body of precedents under which they operate?

Chairman METCALF. Yes, we have the Legislative Journal, but Mr. Watkins, who is the present parliamentarian, is working on that. I hope he retires and finishes that.

Representative CLEVELAND. They are not published?

Chairman METCALF. They're just the Senate Journals. They're nothing comparable to Hinds or Cannon.

Mr. CURTIS. Yes. What we need, of course, is something that you can read that's properly indexed so that you can research it, and if one would take a look at what is in Cannon's precedents, and Hinds, on the subject of contempt, there's a tremendous body of precedents of legislative law there.

I remember 2 years ago in a symposium with lawyers from Yale, and so forth, they were unaware that there was such a body of precedent.

Representative BROOKS. Would the witness yield?

Mr. CURTIS. Yes.

Representative BROOKS. I believe that the House is now beginning to implement, to index, and to put together the rules of the House. Mr. Deschler, our very distinguished and able parliamentarian, has worked on this since long before I was in the Congress. I think we are now getting it done by a book publishing firm.

Mr. CURTIS. I'm using this to illustrate how neglected this area is, because if we had professors of law and people who have been engaged in this practice of law, concerned about it, the pressures would have been such that we would have had it printed, and so that we could use it.

Chairman METCALF. And perhaps the Justices of the Supreme Court would have been able to find out more about what are really legislative activities than they did by just guesswork.

Mr. CURTIS. Senator Metcalf, you have just taken my thunder. That's really what I was leading up to.

Chairman METCALF. You go ahead and say it then.

Mr. CURTIS. I certainly will, and underscore it.

The Supreme Court decisions in recent years, which have attempted to discuss congressional actions, are just an exercise in ignorance, and apparently no one even thought it was worthwhile to find out whether or not there were precedents and a body of law that could be referred to. In fact, what they have said underscores the fact that they were not aware, and, not being aware, misconstrued the conclusions.

I remember on one occasion—I've forgotten the exact case, however, I will supply it—where one of our distinguished judges referred to the fact that a matter had not been very carefully considered, obviously, because it was passed by unanimous consent.

Chairman METCALF. Perhaps they were thinking of securing decisions in the Supreme Court and making an analogy.

Mr. CURTIS. I don't know what they were thinking of. I doubt if the process of cerebration came into it.

This, on the area of contempt, for example, but in this very important area, that I was listening to discussions here a bit on the judicial or the legislative function and this business of speech and debate and the immunity that's put in there. In this instance there is some history—even if people don't want to study the law—that preceded the development of that protection from the British Parliament, and then over in our 13 States and their Houses of Delegates, that pointed out the necessity for the legislative branch being free; the reasons the provision that the legislators not be questioned on what he said in the legislative process.

Because clearly, anyone following the logic through, will see it destroy an independent legislature, if we do not underscore and develop this immunity. Just as the press, which is now pointing out, as they always should that the first amendment is essential in order to have a free press.

I wish the press would get as excited about the need for this as far as the U.S. Congress is concerned, or any legislative branch.

Representative CLEVELAND. Will the gentleman yield?

Mr. CURTIS. Yes.

Representative CLEVELAND. To your knowledge, do any of those precedents going back to either parliamentary or colonial times address themselves to the so-called scope of the legislative process?

As you know, the recent Supreme Court dictum is pretty precise that it's just inside the House and just inside the committee. As you also know and I don't have to tell you, because you've been a distinguished Congressman for a long period of years—much of our activity now, important activity, is either factfinding or helping constituents who are embroiled in bureaucracies outside the Halls of Congress, outside the committee room—but equally as important.

Mr. CURTIS. It has always been shown historically to be so. Just using a little bit of logic would have led the Supreme Court to the right conclusion. After all, a constituent's complaint is the grist of the legislative mill. That's where we get the ideas of where the laws aren't functioning well, where they need changing, or where new laws aren't in existence, or where laws are obsolete. This is an essential part of our representative government itself. If attention is paid to the term "representative," if it means that it is representing a constituency. There must be a communication, free communication, back and forth between the constituency and the person who seeks to represent it. Interfere with that process and you've undermined the whole thing.

This is probably even more important than maybe what actually goes on in the chambers of the House. The right to petition the Government, which is essentially the Congress, although it does apply to the executive, too, is a very fundamental right in representative government, and this interfered with must not be. Here we get into lobbying laws.

Indeed, Congress ought to, in my judgment, pay a great deal more attention to developing better and surer laws in relation to the practice of legislative law or lawmaking.

But this is clearly an essential legislative function, and a corps of judges, who, of course, not having been trained in law school in this big area of the legal practice, do not understand it. Never having developed the discipline, those of us who've practiced in it as Congressmen, or on the outside as lawyers, as lobbyists, again not having developed this as a discipline, this does not come quickly to the attention of those who are in judicial branch.

Again though, the reason why I think the Congress would be wise to have a legal counsel office, which could be developing this expertise, keep pulling these precedents together, calling attention to them, appearing in court for limited purposes, to be sure that the judges do understand this.

Because we really haven't criticized the judges. How can we really criticize them for forgetting this if we who know haven't been in there, we who know, telling them about it?

So this committee, in the interim, is filling this function, and these hearings, will help in seeing that that function is performed.

This was one of the things that was on my mind, and I wanted to express.

There are other functions which are important other than free speech and debate, which are essential also. I mention contempt, not criminal contempt, but simply a matter of conducting orderly hearings, not punishment of some Members or outsiders, but preventing them from being disruptive. There's a great deal of precedent in this area.

Now I want to allude to a case that I got involved in peripherally in the beginning, and then right in the middle, namely, the *Powell* case. This involved the question of discipline of the membership. Of course, we are all aware of the simple discipline when somebody disobeys the decorum on the floor of the House, and blurts out a rather crude expression—and I have had my words taken down. Lew Deschler told me I had my words taken down more often than any other Member of Congress.

I never intended an offense, but I have a tendency, I guess, to be blunt when I believe something needs saying.

But we are familiar with this little area of discipline, but it carries right on through. There is a tremendous body of precedent built up over the years in the operation of the U.S. House of Representatives, of Congress exercising its disciplinary powers of exclusion and expulsion.

Chairman METCALF. Or censure.

Mr. CURTIS. And censure. Just the whole gamut. In the Constitution it's very clearly spelled out that each body of the Congress alone sets its rules of procedure. We have to go to this added dimension to be sure that everyone understands what the legislative process is. So this power of the Congress over the years in this area has been well developed.

But again, because the legislative practice of law has remained undeveloped, the various judges seem to be unaware of this body of precedent.

In this instance, in the *Powell* case, we hired outside counsel, but regrettably, they were untrained in the field of legislative law. Your distinguished counsel on this committee, George Meader, was the

one who put whatever scholarship there was in the thing, because he had researched and did know about these precedents, and we tried to bring it to the attention of the courts.

What came out of the *Powell* case was a very interesting thing: The House moved to do something that many of us had been trying to do for years, established a Committee on Ethics in the House.

Representative DELLENBACK. Official conduct.

Mr. CURTIS. Official conduct. This was a tremendous step forward, because part of the problem, I think, was Congress' neglect of building up the proper rules and regulations on lobbying and campaign financing among other things. This brings up another big area of congressional concern. Congress is the judge of the elections of its members. There's a great body of precedents in regard to congressional contests, of whether the elections are proper, and so forth. Again, this is an area that tends to be neglected by Congress itself, as well as those students on the outside developing a discipline, writing articles and textbooks on it, and so forth.

I think I've covered the main areas that I wanted to stress. I'm sure there are some other important ones. The theme, if I have any, is to underscore the importance of this committee, the need for it to continue moving the way it is. It's going to take time, but I think you are on the right track, and I hope that you will continue on it. Maybe if you think it wise, let's see whether we can't get a counsel, a legal counsel, for the Congress.

Chairman METCALF. Thank you, Congressman Curtis.

We've both served on committees together, not only on this Joint Committee, but when I was a Member of the House. I will always regard you as a Congressman and as a colleague.

I think that you have made a large contribution, and don't give up on this dream of counsel for the Congress, because we haven't given up on it.

I want to go into an area in which you've been very influential and important, and that is to have the Congressional Record read just exactly as it takes place on the floor, and I touched on this today earlier.

There are 435 Members of the House of Representatives and 100 Members of the Senate, and we have a responsibility to try to stand up and explain our views on various legislative matters.

Especially in the House of Representatives, there is no way possible in the time that we have, in 24 hours, to tell our story on the floor. Now how are we going to communicate with our constituents and set our views up so that they can be attacked by our rivals, and we can exercise some leadership, unless we can have newsletters and other things outside and beyond the confines of the committee or the actual floor?

Mr. CURTIS. There is no way, of course. And it's interesting, when I first came to the Congress in 1951, I think it was the unusual Congressman who wrote a newsletter, but before I left in 1968, it was the unusual Congressman who didn't, because they found that this was an essential function of the legislative process. There had to be this two-way street.

And here's where the news media assumes a most important function, and lest I seem unduly critical in what I'm about to say of the news people, I want to add that we too, the legislators, are part of this. The weakest link in representative government today, I think, is the reporting back to the people of what's going on in the legislative process.

But, both professions, those in the Congress as well as those in the news media, are responsible for this situation. It's a combination of effort that can bring this back. But the congressional newsletter has developed, to a large degree, because the Members of the House certainly were feeling that they weren't getting the message through to their constituents of what the real issues were and what was really being debated and discussed.

Chairman METCALF. How on earth, with a 2-hour time, for example, for debate on a major issue, and 5 minutes for a pro forma amendment, can a Member of the House of Representatives, in the formal body, in the Congressional Record—and you always said it should reflect what actually goes on on the floor—if you're just a Member, not on the committee, not with very much seniority, how can you state your position?

Mr. CURTIS. Let me make it clear what my proposal on reform for the Congressional Record was. It was not to eliminate the right to revise and extend, or put in additional material. It was only to permit it in different type, which is entirely different.

Chairman METCALF. To permit it in different type.

Mr. CURTIS. To permit it in different type, and therefore subject to rebuttal of anybody who might be there. That's a little different from when you put it in, without delivering it but they're both important and essential to let the debate go forward.

Chairman METCALF. I once had a major education bill on the floor of the House and my chairman, Mr. Barton at that time, didn't yield to me at any time, and the only time, as the author of that bill, that I got was to offer an amendment to strike out the last three words, and speak on the 5-minute rule. Now the only way that I could explain to the people of the State of Montana my position on that bill was to write a newsletter.

Mr. CURTIS. That's right.

Chairman METCALF. And that happens over and over again, and today our former colleague, Senator Byrd, is using rules of the House more and more by unanimous consent agreement, that we come in and debate for 2 hours, that we'll vote at a certain time, and we are all restricted. There just isn't enough time, there aren't enough hours in the day.

Mr. CURTIS. This is why the Congressional Record is very important, because it does permit you to put your considered thoughts into the Record, and they become part of it.

I think though we now get back perhaps in thinking of the judicial practice of law, that really, the congressional intent sometimes becomes important in a judicial case. This is where the Congressional Record and the committee reports, and so forth, have a bearing.

I think that certainly the most important thing expressed in congressional intent would be a viva voce exchange, but it still is an express congressional intent if somebody put in the written record at the time a considered statement as to what these words were meant to

mean. Because still within the next day or two others who might disagree can come forward and say, "Look, I read what my colleague wrote in the Record, and here are my comments on it," or whatever.

Chairman METCALF. Or the day before the vote he could put it in the record.

Mr. CURTIS. And then refer to it during debate.

Chairman METCALF. We all do that.

Mr. CURTIS. Yes, we all do that, and it's a great technique, but it's not understood, and it's misunderstood, and this is an area of just getting out an understanding to the public of what the congressional system is of the committee hearings, reports, debates, Congressional Record, and so forth, would go a long ways to disabusing these unfortunate judges who don't know about all this.

Chairman METCALF. But it's not completely applicable. We have to send a letter to our constituents in addition, and that's part of the legislative process, in my opinion.

Mr. CURTIS. Also part of the legislative process is the fact that every Congressman today—and I'm very pleased with this—is permitted a district office. In this day and age, where you have sessions throughout the full year, and there is a need for the constituent not to just write you a letter but maybe meet you, and to have the congressional office in the district with a person there to man it, this is part of the legislative process.

I would suggest to the judges, if they really want to understand, in order to enable it to move forward——

Chairman METCALF. That's the roll call.

Mr. CURTIS. I understand you're voting.

Chairman METCALF. I have completed my questions.

Let me say how personally gratified I am that you returned to your old committee to give us some of the benefits of your thoughts. I'll turn the rest over to my colleague, Vice Chairman Brooks.

Mr. CURTIS. Thank you very much, Mr. Chairman. It's been a pleasure.

Representative Brooks [presiding]. I personally am gratified to have you back again, Tom. It's a pleasure to see you. You've done well since you left us, and you did well while you were here. You added a lot of spark and zest and interesting views to congressional debates, and certainly to the old Joint Committee, of which you were an outstanding member.

I think our early deliberations and differences helped to make it possible for this Joint Committee to be created. The Rules Committee had some difficulties, but they did put it together and it was amended some on the floor, but I believe it now is a viable, workable part of the Congress which can make considerable contributions to the betterment and improvement of the legislative part of this Government.

I don't have any questions to ask you. I appreciate your statement, and the one you will submit, and I appreciate your being here.

Do you have any questions, Congressman Cleveland? You are an old friend of Mr. Curtis. I know.

Representative CLEVELAND. I think I would like to second the words of Chairman Metcalf and Vice Chairman Brooks.

The record should show that Congressman Curtis, while he served in the Congress, was one of the leading exponents of improving the Congress, calling attention to the fact that we are a deliberative body,

we're a factfinding body, and anything that impairs that function is a serious threat to the working of our Government.

The Supreme Court is operating in ignorance of how we operate, and has rendered some recent decisions that call for these hearings.

Another problem—and this is a problem that plagued you, Congressman Curtis during your long years in the trenches—is illustrated by the fact, that these hearings which go to the core of representative government, as you know, have been largely unreported.

The press table is empty this afternoon, not because you're here, Congressman Curtis, but it was empty while other important witnesses were here. This is one of the problems, and I think it underscores the fact that you and Chairman Metcalf have pointed out: For us to tell our story to the people that we are representing and to the public at large we absolutely must depend on these newsletters, press releases, and speeches which the Supreme Court writes off as a little "errand boy" function. I think they've missed the mark, and I think it underscores the point.

During the debates here, in discussion of this particular issue, there's been a good deal of talk about the possible analogy between this legislative immunity that we're talking about here and the immunity for newspaper people, the so-called shield laws.

Mr. CURTIS. The fourth estate, yes.

Representative CLEVELAND. Do you find the analogy to be a viable one, or do you think the point is overstressed, as we have tried to make it?

Mr. CURTIS. I think I would put it the other way, that there are some aspects of the fourth estate's immunity that are similar to the congressional. In other words, the importance of the congressional immunity is the big area of which reporting is an important aspect, and to the extent that, after all, the first amendment was put in there to further really representative government, and this is an aspect of representative government. To the extent that the first amendment, the right of free speech, is impaired, because it's not only the right to speak, but to assemble, for what purposes, possibly for governmental action, or whatever, so it's like saying a leg is a part of the whole body. This is a part of this bigger immunity that goes with the legislative process.

Am I coming through on this point? Because I think it is comparable, but that is simply a part of a much bigger and more important function, the congressional.

Representative CLEVELAND. I think the reason that we're suggesting an analogy is that as Congressmen we don't want the public to feel that what we're trying to do in staking out this legislative immunity is setting ourselves aside as privileged citizens who can drive a car 90 miles an hour through a 35-mile-an-hour zone.

Mr. CURTIS. No, of course not.

Representative CLEVELAND. What we're trying to point out is that this is the guts of representative government, and what we're trying to do is insure that if we do our proper job, we're protected, so that we won't have hanging over our heads the threat that some grand jury might call us somewhere, or if I issue a report that I picked up downtown from the FDA, I won't have a pharmaceutical company suing me, as they might, for saying their product's no good.

But you do have this problem, the public relations problem, the image problem, or whatever you want to call it. This could all just

be brushed aside as a bunch of Congressmen and Senators trying to set themselves up in a privileged situation above the rest of the people.

Mr. CURTIS. What I'm saying is that the people in the news media, if they really will think this thing through, will find that they are part of this bigger thing, and they'd better pay attention to the point that you are making, because the right of freedom of speech is really to develop the representative system of government.

Representative CLEVELAND. To get the facts.

Mr. CURTIS. Yes; to get the facts, to have free exchange so that people can assemble, so that they can petition the Government. All of this is part of this process, and if they permit the more important part of the function to be weakened, they're surely going to go down along with it.

In neither instance would I say, just as you point out, that this is an attempt, because you're in the Congress, or you're a member of the press, to say these people, because they are immune per se for their action in this function, and in doing that there has to be the immunity. But there are many ways that should be available so that one can, if the punishment is in line, punish them for that act in a way that you do not interfere with this fundamental process.

Sometimes you just are going to have to forget about punishing him. Vote them out of office, if they're Congressmen, or, hopefully, the Congress will set up its own set of disciplines.

If it's in the news media and there's been an abuse there, maybe they will develop to some degree a code of ethics for themselves.

Representative CLEVELAND. Have they done that yet?

Mr. CURTIS. There are attempts to do it, yes.

I must say, in many, many ways, there are many people in the news media who are working very hard to do it. I don't think they are getting very far, but we haven't gotten too far either in the Congress.

Representative BROOKS. Would the gentleman yield?

Representative CLEVELAND. Yes.

Representative BROOKS. Would you think that the press, the news media, should readily understand if they can muzzle Congressmen, House Members and Senators, from getting and divulging information that they feel is pertinent to their constituents, to their country, they will chop up the media like nothing. They'll cut them off and effectively muzzle them, and then nobody will be able to tell the public what goes on in an administration, regardless of what the body is.

Mr. CURTIS. You are so right. If you get a weak Congress, a subservient Congress, where goes these other basic rights in our society? This is really the basis of representative government here, and we all must rally round to try to preserve the independence and the integrity of it.

Representative CLEVELAND. Tom, as I said earlier, it seems too bad that these hearings haven't excited any general interest. Of course, there are much more interesting things going on, and you just pick up the Washington Post and you'll find out what they are.

But I was very interested in your saying that you hoped, through your present position as a vice president and counsel, for the Encyclopaedia Britannica—and I also understand that you do some work for one of the important foundations in the country—that you hope to encourage the bar association and the law schools to take just a little bit more interest in this legislative practice of law.

Mr. CURTIS. I'm on a seven-man committee that's just been appointed by the American Bar Association to review the teaching of law. The bar has a standing committee, but I must say it's dominated by deans and other academicians, and it just doesn't seem that you can get this broad approach to it this way. This committee has just been appointed, and it's got a budget to hopefully really get into this.

In my function as general counsel of Britannica's, I have been trying to get successfully, outside counsel, one of the prominent firms in Chicago, to understand that the legislative practice of law is an honorable one, can be and is conducted on an honorable basis, by most of the people in it, and to get in it in a professional way, which they are now doing, I'm happy to say.

It isn't wheeling and dealing. It really requires some of the deepest studies that lawyers can get into, in trying to figure out how to write legislation, how to correct it, how to present a proper case before a congressional committee, and so forth.

So this is coming about, I think, and I am most anxious that we move forward. This committee, by doing what it's doing, in following up these cases, is helpful. I have cited some of your reports to my colleagues on the ABA committee.

Representative CLEVELAND. Thank you, Mr. Chairman.

Representative BROOKS. Surely, Congressman Dellenback.

Representative DELLENBACK. Thank you, Mr. Chairman.

Congressman CURTIS. We're glad to see you back. It's refreshing to listen once again to a man whom I looked warmly upon and up to when I first came here.

Whether you think there is immortality or not, Congressman CURTIS lives, after his physical departure from the floor of the House, in the memories of many of us, and the influence he has on some of our actions now. So I'm grateful to you for the help you were to me when I first came here and you were already established in the legislative process.

As I say, it's refreshing to hear you again. You sound just as you did then, equally calm and circumspect.

In your suggestions about this law school today, which, while it is not in one sense within the direct scope of what this committee is now dealing with, I found it very refreshing and loaded with promise. I wish you the very best, and I hope that you will keep the Congress current with what the bar association does, because those of us who are lawyers and members of the bar association want to do what we can, both inside and outside, to do some good.

Mr. CURTIS. I want to do that, and I welcome the opportunity to say that I was engaged in this. You were one whom I had in the back of my mind I wanted to talk to and keep in touch with.

Representative DELLENBACK. May we ask you just a couple of questions along the line of the direct thrust of what we have been primarily concentrating on?

Your testimony has been helpful, being broad and titillating our imaginations, and memories, and consciences about some of the other things we should be doing.

We are looking principally right now at this question of immunity, and immunity, as you realize at least as well as we, isn't a case of what sort of protective shield we can put around ourselves as individuals, but what is it we need to do as lawmakers and as representatives of

the people to be sure that the legislative process functions in its broadest scope. That's all we're interested in, and you realize that full well.

We've had not only the testimony you've heard as you were waiting to go on this afternoon, but we've had some from Congressmen, some Senators, we had heard from Justice Goldberg, all who were giving us some valuable input.

Do you have anything that you would add in connection with the article I, section 6, speech and debate clause, on the question of how broadly that phrase should be interpreted, first as a constitutional issue, and second as a base which, in connection with the necessary and proper clause and the legislative powers clause of article I, we can soundly use to legislate in this particular field?

Mr. CURTIS. The breadth of this is the breadth of the legislative process and, what I have been saying in agreeing to the Members statements to me, as to whether it included such things as newsletters, whether it included the consultation that went on with a constituent.

Take the case of—I'm trying to remember the name of a former colleague who was in a bribery case.

Representative BROOKS. Brewster?

Mr. CURTIS. No. From Texas.

Representative DELLENBACK. John Dowdy.

Mr. CURTIS. Yes.

The concept of protection is on that, but the key to this thing is this immunity. Whether there was or wasn't. Where in the *Brewster* case, in the same situation, this conversation was in carrying out a necessary legislative function.

I think that these kinds of rulings which are developing at this point, are educating the courts as well as the public of what the scope of the legislative function is. This spells out this wide breadth.

I think we need a colloquy in the country of what is representative government, what is this process. Is it really just confined to the Chambers of the Congress?

I think anyone who's been in the process, even at the county council level, or a small city on the board of aldermen, and so forth, understands that this goes way beyond what actually goes on at the time of debate and vote. You're debating with your colleagues, information gathering, in order to zero in on the issue, as part of this process, and it must be protected.

Representative DELLENBACK. You speak eloquently to our need to do something about the broad sweep. What we do, of course, breaks down between the question, of what is already in the Constitution versus what we need do in the field of legislation to build on top of it.

I wonder if you have anything, as an able lawyer, that you could say on that?

Mr. CURTIS. Yes. Let me take the negative side of the thing.

What is an improper way to petition the Congress? Because there are improprieties. You build up a body of law to some degree against impropriety. There are laws against impropriety. This is what I think we need to pay attention to right at this critical time with the problem between the executive and the legislature.

One of the points I sought to make throughout my years here was that the executive had no right to come and lobby the Congress. In fact, there were two criminal statutes that are written vaguely, but

nonetheless were on the books prohibiting executive lobbying. Zero in and say, "The executive cannot do this." Today executive lobbying is hailed around the country as astute politics. I call it corrupt politics.

But this area needs to be developed in discipline, and the Congress is the one to do it.

If we want to protect the integrity of our committee hearing, we mustn't have this business of people sneaking in, like sneaking into a judge's chamber when the others aren't there.

Yet, on the other hand, in our desire to get information, we want a free flow, so it isn't just like your judge's chamber.

But develop these kinds of guidelines, because most people who are lobbying up here want to do it in the proper way, and do it in a fair way. But we haven't set up the guidelines clearly enough so they can. So when you don't, this creates a suspicion that it is who you know, or getting around and seeing them this way.

So I think Congress could think in terms of well now, how do we properly meet with our constituents. It doesn't have to be any broad spelling out, but I think there needs to be a code of ethics.

I have urged the American Bar Association to start developing codes of ethics in this area of legislative practice, because most of the people in it are lawyers, and certainly they can set a standard, even though we don't restrict lobbying to people who are members of the bar.

But here is the area that I see, if you develop these things then there won't be, the attacks. The courts will understand, and say, "Look. Here's the way to correct the improprieties here."

I think there is a tendency to say, "Gee, are we going to let bribery go because of this?" Well, it shouldn't say we're letting it go. It simply says, "You must protect this, and there are other ways of getting at the offense of bribery, or correcting other abuses of the legislative process."

Representative DELLENBACK. Would you shift the forum, Tom, so that any question in this field, and you and I agree that there should be some sort of sanctions attached to improprieties in the field? Would you shift the forum from the courts to the Congress?

Mr. CURTIS. I would think in some instances you would want to. For instance, take contempt. We have shifted some of them. Although we have the basic power in Congress for our own contempt, we have found it probably works better to use the judicial system. But that doesn't mean that we couldn't, and shouldn't, in my judgment, develop our own powers of contempt.

So I would say here there are many areas where we would want to handle the discipline ourselves. But I think also, just as, in effect, we have probably defined bribery and have said it relates to people in the Congress, or in the election process.

If people would just read some of the cases of exclusion of Members of the House back in the 1900's, they would find these were because of election frauds, and part of that did permit judicial process, although the culprit was actually, before the conversion, before the House Administration Committee.

Representative DELLENBACK. It wouldn't be your inclination to grant exclusive jurisdiction over the trial of these offenses to the Congress as opposed to the courts?

Mr. CURTIS. I think there's a place that both tools can be used. I think the peccadillo kind of thing, to keep order, let's say, yes, let's use our contempt, just keeping decorum, or order, or whatever. But when it comes to something more major, I think we would be wise to use the courts where we can because this does provide a much better, clearer system of what we call due process, and so forth.

I think there really is a part to play for both in these matters, and what we've got to do is start thinking: Where does the Congress best handle the thing? For instance, in lobbying techniques: Where do the lobbying techniques get so bad, like in campaign financing, which is so tied in?

We've got to start spelling this out, so that people who want to contribute to campaigns properly and aboveboard, not to influence, but to be part of the election process, can do so.

Yet, because this isn't spelled out, it's easy, you see, for those who are abusing it.

Here I think we've got a place for the courts, although the bulk of this, I think, can be handled through our own disciplinary procedures.

Representative DELLENBACK. What you're saying right now I think has great significance, because there have been expressions before this committee that in order for it to function effectively so that there is no outside duress, it is imperative that the entire field be taken away from the courts and be made subject to the election or reelection process, or to the discipline within the body.

Mr. CURTIS. I haven't thought it through enough, but my quick judgment would be not the entire field. The authority is here, but I think we can use the tool of the judicial system in a discriminating way as a factor.

Representative DELLENBACK. Because you have been so deeply involved in this, Mr. Chairman, I'm going to ask you to, if Mr. Curtis sees fit to think further on this point and submit to us any comments that he would make, that part of the record, because we are speaking now right to a point of major significance, and what Mr. Curtis is saying is somewhat at variance with some of the thinking which has been expressed by some others, and I would like very much to have that as a distinct input.

Representative BROOKS. Without objection, it would be perfectly appropriate for the distinguished witness to submit a carefully thought out reply on that subject, remembering, of course, that you did say the Congress had the full authority.

Mr. CURTIS. I think the authority is here.

Representative BROOKS. It's their decision, but they utilize the other too.

Mr. CURTIS. Yes; that would be their decision. I think the bench correctly interpreted what I was saying.

But I do think the judicial branch is useful. We can use it. But, on the other hand, if we find in certain areas that isn't working, we pull it back. But the basic authority must be here, in my judgment.

Representative DELLENBACK. If you can give us something on that, I would find it very welcome, and I'm sure the committee would too.

Mr. CURTIS. I would be very pleased to, and I'll try to do just exactly that.

Representative DELLENBACK. We're very grateful to you for your help and your contribution. Thank you for taking the time.

Representative BROOKS. Thank you, Mr. Dellenback.

We appreciate your coming down, and we welcome you back. We appreciate your contribution. I wish you well.

Mr. CURTIS. Thank you.

Representative BROOKS. The committee stands adjourned, subject to call of the Chair.

[Whereupon, the subcommittee was adjourned at 4:20 p.m., to reconvene subject to call of the Chair.]

APPENDIX

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BREWSTER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 70-45. Argued October 18, 1971—Reargued March 20, 1972—
Decided June 29, 1972

Appellee, a former United States Senator, was charged with the solicitation and acceptance of bribes in violation of 18 U. S. C. §§ 201 (c) (1) and 201 (g). The District Court, on appellee's pre-trial motion, dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act." The United States filed a direct appeal to this Court under 18 U. S. C. § 3731, which appellee contends this Court does not have jurisdiction to entertain because the District Court's action was not "a decision or judgment setting aside, or dismissing" the indictment but was instead a summary judgment on the merits based on the facts of the case. *Held:*

1. This Court has jurisdiction under 18 U. S. C. § 3731 to hear the appeal, since the District Court's order was based upon its determination of the constitutional invalidity of 18 U. S. C. §§ 201 (c) (1) and 201 (g) on the facts as alleged in the indictment. Pp. 3-6.

2. The prosecution of appellee is not prohibited by the Speech or Debate Clause. Although that provision protects members of Congress from inquiry into legislative acts or the motivation for performance of such acts, *United States v. Johnson*, 383 U. S. 169, 185, it does not protect all conduct relating to the legislative process. Since in this case prosecution of the bribery charges does not necessitate inquiry into legislative acts or motivation, the District Court erred in holding that the Speech or Debate Clause required dismissal of the indictment. Pp. 6-27.

Reversed and remanded.

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Syllabus

BURGER, C. J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant,	}	On Appeal from the United
<i>v.</i>		States District Court for
Daniel B. Brewster.		the District of Columbia Circuit.

[June 29, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This direct appeal from the District Court presents the question whether a Member of Congress may be prosecuted under 18 U. S. C. §§ 201 (c)(1), 201 (g), for accepting a bribe in exchange for a promise relating to an official act. Appellee, a former United States Senator, was charged with five counts of a 10-count indictment.¹ Counts one, three, five, and seven alleged that on four separate occasions, appellee, while he was a Senator and a member of the Senate Committee on Post Office and Civil Service,

“directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . in violation of Sections 201 (c)(1) and 2, Title 18, United States Code.”²

¹ The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U. S. C. § 201 (b).

² 18 U. S. C. § 201 (c)(1) provides: “Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives,

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Count nine charged that appellee

"directly and indirectly, asked, demanded, ex solicited, sought, accepted, received and agree to receive [a sum] . . . for and because of the acts performed by him in respect to his vote and decision on postage rate legislation had been pending before him in his official capacity . . . in violation of Sections 201 (g) and 218, United States Code."³

Before a trial date was set, the appellee moved to dismiss the indictment on the ground of immunity under the Speech or Debate Clause, Art. I, § 6, of the Constitution, which provides:

"for any Speech or Debate in either House [Senators or Representatives] shall not be questioned in any other Place."

After hearing argument, the District Court ruled against the appellee on the bench:

"Gentlemen, based on the facts of this

or agrees to receive anything of value for himself or for any person or entity, in return for:

"(1) being influenced in his performance of any official duty [shall be guilty of an offense]."

18 U. S. C. § 201 (a) defines "public official" to include "any member of Congress." The same subsection provides: "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending or which may lawfully be brought before any public official, in his official capacity, position or place of trust or profit." 18 U. S. C. § 2 is the general bribery or abetting statute.

³ 18 U. S. C. § 201 (g) provides: "Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, receives, seeks, accepts, receives, or agrees to receive anything of value for himself or for because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

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it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

"It is the opinion of this Court that the immunity under the Speech and [*sic*] Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

"I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, as they apply to Senator Brewster."

The United States filed a direct appeal to this Court, pursuant to 18 U. S. C. § 3731 (Supp. V, 1970).⁴ We postponed consideration of jurisdiction until hearing the case on the merits. 401 U. S. 935 (1971).

I

The United States asserts that this Court has jurisdiction under 18 U. S. C. § 3731 (Supp. V, 1970) to review the District Court's dismissal of the indictment

⁴ 18 U. S. C. § 3731 (Supp. V, 1970) provides:

"An appeal may be taken by and on behalf of the United States from the district court direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute has since been amended to eliminate the direct appeal provision on which the United States relies. 18 U. S. C. § 3731. This appeal, however, was perfected under the old statute.

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against appellee. Specifically, the United States urges that the District Court decision was either "a decision or judgment setting aside, or dismissing [an] indictment . . . or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded" or a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." If the District Court decision is correctly characterized by either of those descriptions, this Court has jurisdiction under the statute to hear the United States' appeal.

In *United States v. Knox*, 396 U. S. 77 (1969), we considered a direct appeal by the United States from the dismissal of an indictment that charged the appellee in that case with violating 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency. The appellee, Knox, had been accused of willfully understating the number of employees accepting wagers on his behalf when he filed a form which persons engaged in the business of accepting wagers were required by law to file. The District Court dismissed the counts charging violations of § 1001 on the ground that the appellee could not be prosecuted for failure to answer the wagering form correctly since his Fifth Amendment privilege against self-incrimination prevented prosecution for failure to file the form in any respect. We found jurisdiction under § 3731 to hear the appeal in *Knox* on the theory that the District Court had passed on the validity of the statute on which the indictment rested. 396 U. S., at 79 n. 2. The District Court in that case held that "§ 1001, as applied to this class of cases, is constitutionally invalid."

The counts of the indictment involved in the instant case were based on 18 U. S. C. § 201, a bribery statute. Section 201 applies to "public officials," and that term is defined explicitly to include Members of Congress as well as other employees and officers of the United

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States. Subsections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act. The ruling of the District Court here was that "the Speech or Debate Clause of the Constitution, particularly in view of the interpretation given . . . in *Johnson*, shields Senator Brewster . . . from any prosecution for alleged bribery to perform a legislative act." Since § 201 applies only to bribery for the performance of official acts, the District Court's ruling is that, as applied to Members of Congress, § 201 is constitutionally invalid.

Appellee argues that the action of the District Court was not "a decision or judgment setting aside, or dismissing" the indictment, but was instead a summary judgment on the merits. Appellee also argues that the District Court did not rule that § 201 could never be constitutionally applied to a Member of Congress, but that "based on the facts of this case" the statute could not be constitutionally applied. Under *United States v. Sisson*, 399 U. S. 267 (1970), an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available. See *United States v. Findley*, 439 F. 2d 970 (CA1 1971). Appellee claims that the District Court relied on factual matter other than facts alleged in the indictment.

An examination of the record, however, discloses that, with the exception of a letter in which the United States briefly outlined the theory of its case against appellee, there were no "facts" on which the District Court could act other than those recited in the indictment. Appellee, contends that the statement "based on the facts of this case," used by the District Judge in announcing his decision, shows reliance on the Government's outline

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of its case. We read the District Judge's reference to "facts," in context, as a reference to the facts alleged in the indictment and his ruling as holding that Members of Congress are totally immune from prosecution for accepting bribes for the performance of official, *i e.*, legislative, acts by virtue of the Speech or Debate Clause. Under that interpretation of § 201, it cannot be applied to a Member of Congress who accepts bribes that relate in any way to his office. We conclude, therefore, that the District Court was relying only on facts alleged in the indictment and that the dismissal of the indictment was based on a determination that the statute on which the indictment was drawn was invalid under the Speech or Debate Clause. As a consequence, this Court has jurisdiction to hear the appeal.

II

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States v. Johnson*, 383 U. S. 169 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

"was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the

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independence and integrity of the legislature." *Id.*, at 178 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.⁵ Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the legislative branch to acknowledge that our history does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the Seventeenth and Eighteenth Century English Kings, without meaningful recourse to a writ of habeas corpus.⁶ In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause

⁵ Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. 1, 15 (1968); Note, *The Bribe Congressman's Immunity from Prosecution*, 75 Yale L. J. 335, 337-338 (1965).

⁶ See C. Wittke, *The History of English Parliamentary Privilege*, 23-32 (1921).

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in the context of a criminal charge against a Member of Congress.

(a) In *United States v. Johnson*, *supra*, the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict of interest statute, 18 U. S. C. § 281 (1964), and on one count of conspiracy to defraud the United States, 18 U. S. C. § 371 (1964). The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, 383 U. S., at 183, cited the oft-quoted passage of Mr. Justice Lush in *Ex parte Wason*, LR 4 Q. B. 573 (1869):

“I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House.*” *Id.*, at 577 (emphasis added).

In *Kilbourn v. Thompson*, 103 U. S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything “generally done in a session of the House by one of its members in relation to the business before it.” *Id.*, at 204. This statement, too, was cited with approval in *Johnson*, 383 U. S., at 179. Our conclusion in *Johnson* was that the privilege protected members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.*, at 185.

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy to defraud count alleged an

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agreement among Representative Johnson and three co-defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, the Government claimed Johnson was paid a bribe. At trial, the Government questioned Johnson extensively, relative to the conspiracy to defraud count, concerning the authorship, of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it depended on inquiries into speeches made in the House.

It is important to note the very narrow scope of the Court's holding in *Johnson*:

"We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U. S., at 184-185.

The opinion specifically left open the question of a prosecution, which though possibly entailing some reference to legislative acts, is founded upon a "narrowly drawn" statute passed by Congress in the exercise of its power to regulate its Members' conduct. Of more relevance to this case, the Court in *Johnson* emphasized that its decision did not affect a prosecution which, though founded on a criminal statute of general application, "does not draw in question the legislative acts of the defendant member of Congress or his motives

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for performing them.” *Id.*, at 185. The Court did not question the power of the United States to try Johnson on the conflict of interest counts, and it authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated.⁷

Three members of the Court would have affirmed Johnson’s conviction. Chief Justice Warren, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, concurring in part and dissenting in part, stated:

“After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence concerning the speech infected the jury’s judgment on the [conflict of interest] counts. The evidence amply supports the prosecution’s theory and the jury’s verdict on these counts—that the respondent received over \$20,000 for attempting to have the Justice Department dismiss an indictment against his [present] co-conspirators, without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a Member of the Congress. . . . The arguments of government counsel and the court’s instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury and the respondent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize sim-

⁷ On remand, the District Court dismissed the conspiracy count without objection from the Government. Johnson was then found guilty on the remaining counts, and his conviction was affirmed. *United States v. Johnson*, 419 F. 2d 56 (CA4 1969), cert. denied, 397 U. S. 1010 (1970).

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ilar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts." [Footnote omitted.]

Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House in the performance of official duties and the motivation for those acts.

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a

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session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, *supra*, at 204, or things "said or done by him as a representative, in the exercise of the functions of that office," *Coffin v. Coffin*, 4 Mass. 1, 27 (1808).

(b) Appellee argues, however, that in *Johnson* we expressed a broader test for the coverage of the Speech or Debate Clause. It is urged that we held that the Clause protected from Executive or Judicial inquiry all conduct "related to the due functioning of the legislative process." It is true that the quoted words appear in the *Johnson* opinion, but appellee takes them out of context; in context they reflect a quite different meaning from that now urged. Although the indictment against Johnson contained eight counts, only one count was challenged before this Court as in violation of the Speech or Debate Clause. The other seven counts concerned Johnson's attempts to influence members of the Justice Department to dismiss pending prosecutions. In explaining why those counts were not before the Court, Mr. Justice Harlan wrote:

"No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise *related to the due functioning of the legislative process*. It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal." 383 U. S., at 172. (Emphasis added; footnotes omitted.)

In stating that those things "in no wise related to the due functioning of the legislative process" were *not* covered by the privilege, the Court did not in any sense imply as a corollary that everything that "related" to the

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office of a member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn v. Thompson*, that only acts generally done in the course of the process of enacting legislation were protected.

Nor can we give *Kilbourn* a more expansive interpretation. In citing with approval, 103 U. S., at 203, the language of Chief Justice Parsons of the Supreme Judicial Court of Massachusetts in *Coffin v. Coffin*, 4 Mass. 1 (1808), the *Kilbourn* Court gave no thought to enlarging "legislative acts" to include illicit conduct outside the House. The *Coffin* language is:

"[The Massachusetts legislative privilege] ought not to be construed strictly, but liberally that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution, *for every thing said or done by him, as a representative, in the exercise of the functions of that office*, without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber." *Id.*, at 27 (emphasis added).

It is suggested that in citing these words, which were also quoted with approval in *Tenney v. Brandhove*, 341 U. S. 367, 373-374 (1951), the Court was interpreting the sweep of the Speech or Debate Clause to be broader than *Johnson* seemed to indicate or than we today hold. Emphasis is placed on the statement that "there are

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cases in which [a Member] is entitled to this privilege when not within the walls of the representatives' chamber." But the context of *Coffin v. Coffin* indicates that in this passage Chief Justice Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber. In another passage, the meaning is clarified:

"If a member . . . be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions as a representative, in committee, either in debating, in assenting to, or in draughting a report."⁸ 4 Mass., at 28.

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.⁹

⁸ It is especially important to note that in *Coffin v. Coffin*, the court concluded that the defendant was not executing the duties of his office when he allegedly defamed the plaintiff and was hence not entitled to the claim of privilege.

⁹ The "concession" MR. JUSTICE BRENNAN seeks to attribute to the Government lawyer who argued the case in the District Court reveals no more than the failure of the arguments in that court to focus on the distinction between true legislative acts and the myriad related political functions of a Member of Congress. The "concession" came in response to a question which clearly revealed that the District Court treated as protected all acts "related" to the office rather than limiting the protection to what "is said or done by him as a representative in the exercise of the functions of that office."

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In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.¹⁰ Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

(c) We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy

¹⁰ See *Kilbourn v. Thompson*, 103 U. S. 168 (1881) (voting for a resolution); *Tenney v. Brandehove*, 341 U. S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States v. Johnson*, 383 U. S. 169 (1966) (making a speech on House floor); *Dombrowski v. Eastland*, 387 U. S. 82 (1967) (subpoenaing records for committee hearing); *Powell v. McCormack*, 395 U. S. 486 (1969) (voting for a resolution).

In *Coffin v. Coffin*, 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

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others with impunity, but that was conscious choice of the Framers.¹¹

The history of the privilege is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

“The practice of granting the privilege of freedom from arrest and molestation to members’ servants in time became a serious menace to individual liberty and to public order, and a form of protection by which offenders often tried—and they were often successful—to escape the penalties which their offenses deserved, and which the ordinary courts would not have hesitated to inflict. Indeed the sale of ‘protections’ at one time proved a source of income to unscrupulous members and those ‘parliamentary indulgences’ were on several occasions obtainable at a fixed market price.” C. Wittke, *The History of English Parliamentary Privilege*, 39 (1921).

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond

¹¹ “To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. . . . The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.” *Coffin v. Coffin*, 4 Mass. 1, 28 (1808).

See *Cochran v. Couzens*, 42 F. 2d 783 (CADC), cert. denied, 282 U. S. 874 (1930) (defamatory words uttered on Senate floor could not be basis of slander action).

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what is necessary to preserve the integrity of the legislative process. Moreover, unlike England with no formal, written constitutional limitations on the monarch, we defined limits on the co-ordinate branches, providing other checks to protect against abuses of the kind experienced in that country.

It is also suggested that even if we interpreted the Clause broadly so as to exempt from inquiry all matters having any relationship to the legislative process, misconduct of Members would not necessarily go unpunished because each House is empowered to discipline its Members. Article I, § 5, does indeed empower each House to "determine the rules of its Proceedings, punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member," but Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process. In this sense the English analogy on which the dissents place much emphasis, and the reliance on *Ex parte Wason*, L. R. 4 Q. B. 573 (1869), are inapt. Parliament is itself "The High Court of Parliament"—the highest court in the land—and its judicial tradition better equips it for judicial tasks.

"It is by no means an exaggeration to say that [the judicial characteristics of Parliament] colored and influenced some of the great struggles over legislative privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court—the highest court of the realm, often acting in a judicial capacity and in a judicial manner—persisted longer than in the history of privilege of Parliament." C. Wittke, *The History of English Parliamentary Privilege*, 14 (1921).

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The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal.

In Australia and Canada, "where provision for legislative free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm, courts have held that the privilege does not bar the criminal prosecution of legislators for bribery." Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *Yale L. J.* 335, 338 (1965) (footnote omitted). Congress has shown little inclination to exert itself in this area.¹² Moreover, if Congress did lay aside its normal activities and take on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function, the independence of individual Members might actually be impaired.

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards¹³ and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review.

¹² See Thomas, *Freedom of Debate: Protector of the People or Haven for the Criminal?*, 3 *The Harvard Rev.* 74, 80-81 (No. 3, 1965); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *Yale L. J.* 335, 349 n. 84 (1965); Oppenheim, *Congressional Free Speech*, 8 *Loyola L. Rev.* 1, 27-28 (1955-1956).

¹³ See, *e. g.*, *In re Chapman*, 166 U. S. 661, 669-670 (1897):

"The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."

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In short a Member would be compelled to defend in what would be comparable to a criminal prosecution without the safeguards provided by the Constitution. Moreover, it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment.¹⁴ Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

Finally, the jurisdiction of Congress to punish its Members is not all-embracing. For instance, it is unclear to what extent Congress would have jurisdiction over a case such as this in which the alleged illegal activity occurred outside the chamber, while the appellee was a Member, but was undiscovered or not brought before a grand jury until after he left office.¹⁵

The sweeping claims of appellee would render Members of Congress virtually immune from a wide range

¹⁴ See the account of the impeachment of President Andrew Johnson in J. Kennedy, *Profiles in Courage*, 126-151 (1955). See also the account of the impeachment of Justice Samuel Chase in 3 A. Beveridge, *Life of Marshall*, at 169-220 (1919).

¹⁵ "English Parliaments have historically reserved to themselves and still retain the sole and exclusive right to punish their members for the acceptance of a bribe in the discharge of their office. No member of Parliament may be tried for such an offense in any court of the land." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 *Suffolk L. Rev.* 1, 15-16 (1968). That this is obviously not the case in this country is implicit in the remand of Representative Johnson to be retried on bribery charges.

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of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6. The very sentence in which the Speech or Debate Clause appears provides that Members "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses. . . ." In *Williamson v. United States*, 207 U. S. 425 (1908), this Court rejected a claim, made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands, that he could not be arrested, convicted, or imprisoned for any crime that was not treason, felony, or breach of the peace in the modern sense, *i. e.*, disturbing the peace. Mr. Justice Edward Douglass White noted that when the Constitution was written the term "Breach of the Peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law. Quoting Lord Mansfield, he noted, with respect to the claim of parliamentary privilege, "The laws of this country allow no place or employment as a sanctuary for crime" *Id.*, at 439.

The subsequent case of *Long v. Ansell*, 293 U. S. 76 (1934), held that a Member's immunity from arrest in civil cases did not extend to civil process. Mr. Justice Brandeis wrote for the Court:

"Clause 1 [of Article I, § 6] defines the extent of the immunity. Its language is exact and leaves no room for construction which would extend the privilege beyond the terms of the grant." *Id.*, at 82.

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We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin. It can hardly be thought that the Speech or Debate Clause totally protects what the sentence preceding it has plainly left open to prosecution, *i. e.*, all criminal acts.

(d) MR. JUSTICE WHITE suggests that permitting the Executive to initiate the prosecution of a Member of Congress for the specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislature—for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment. But, as we have just noted, the Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government which delegates to each of the three branches separate and independent powers.¹⁶ In the *Federalist*

¹⁶ The potential for harassment by an unscrupulous member of the Executive Branch may exist, but this country has no tradition of absolute congressional immunity from criminal prosecution. See *United States v. Quinn*, 141 F. Supp. 622 (SDNY 1956) (motion for acquittal granted because the defendant Member of Congress was unaware of receipt of fees by his law firm); *Burton v. United States*, 202 U. S. 344 (1906) (Senator convicted for accepting compensation to intervene before Post Office Department); *United States v. Dietrich*, 126 F. 671 (CCD Neb. 1904) (Senator-elect's accepting payment to procure office for another not covered by statute); *May v. United States*, 175 F. 2d 994 (CA DC), cert. denied, 338 U. S. 830 (1949) (Congressman convicted of receiving compensation for services before an agency); *United States v. Bramblett*, 348 U. S. 503 (1955) (Congressman convicted of defrauding government agency). *Bramblett* concerned a Congressman's misuse of office funds via a "kick-back" scheme, which is surely "related" to the legislative office.

A strategically timed indictment could indeed cause serious harm to a Congressman. Representative Johnson, for example, was indicted while campaigning for re-election, and arguably his indictment contributed to his defeat. On the other hand, there is the

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No. 73, Hamilton expressed concern over the possible hazards that confronted an Executive dependent on Congress for financial support.

"The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might in most cases either reduce him by famine, or tempt him by largesses, to surrender at discretion, his judgment to their inclinations."

Yet Hamilton's "parade of horrors" finds little real support in history. The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, *e. g.*, *United States v. Lovett*, 328 U. S. 303 (1946). The system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th century.

Probably of more importance is the public reaction engendered by any attempt of one branch to dominate

classic case of Mayor Curley who was re-elected while under indictment. See 4 New Catholic Encyclopedia, at 541 (1967). Moreover, we should not overlook the barriers a prosecutor, attempting to bring such a case, must face. First, he must persuade a grand jury to indict, and we are not prepared to assume that grand juries will act against a Member without solid evidence. Thereafter, he must convince a petit jury beyond a reasonable doubt with the presumption of innocence favoring the accused. A prosecutor who fails to clear one of these hurdles faces serious practical consequences when the defendant is a Congressman. The Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members. Perhaps more important is the omnipresence of the news media whose traditional function and competitive inclination affords no immunities to reckless or irresponsible official misconduct.

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or harass another. Even traditional political attempts to establish dominance have met with little success owing to contrary popular sentiment. Attempts to "purge" uncooperative legislators, for example, have not been notably successful. We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years,¹⁷ have been abused by the Executive Branch. When a powerful Executive sought to make the Judicial Branch more responsive to the combined will of the Executive and Legislative Branches, it was the Congress itself that checked the effort to enlarge the Court. 2 M. Pusey, Charles Evans Hughes, c. 70 (1951).

We would be closing our eyes to the realities of the American political system if we failed to acknowledge that many non-legislative activities are an established and accepted part of the role of a Member, and are indeed "related" to the legislative process. But if the Executive may prosecute a Member's attempt, as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe. We therefore see no substantial increase in the power of the Executive and Judicial Branches over the Legislative Branch resulting from our holding today. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.

We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a

¹⁷ The first bribery statute applicable to Congressmen was enacted in 1853. Act of Feb. 26, 1853, c. 81, § 6, 10 Stat. 171.

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bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses, by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence. Given the disinclination and limitations of each House to police these matters, it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress. 2 U. S. C. § 192.

It is beyond doubt, that the Speech or Debate Clause protects against inquiry into acts which occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members. We turn next to determine whether the subject of this criminal inquiry is within the scope of the privilege.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a *prima facie* case. Four of the five counts

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charge that appellee "corruptly asked, solicited, sought, accepted, received, and agreed to receive" money "in return for being influenced . . . in respect to his action, vote, and decision on postage rate legislation, which might at any time be pending before him in his official capacity." This is said to be a violation of 18 U. S. C. § 201 (c)(1), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . being influenced in his performance of any official act" is guilty of an offense.

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature and execution of the office." Nor is it "a thing said or done by him as a representative in the exercise of the functions of the office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not

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draw into question the legislative acts of the defendant Member of Congress or his motives for performing them." 383 U. S., at 185.

Nor does it matter if the Member defaults on his illegal bargain. To make a *prima facie* case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." This count is founded on 18 U. S. C. § 201 (g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for

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paying the money is sufficient to carry the case to the jury.

MR. JUSTICE WHITE rests heavily on the fact that the indictment charges the offense as being in part linked to Brewster's "action, vote and decision on postal rate legislation." This is true, of course, but our holding in *Johnson* precludes any showing of how he acted, voted or decided. The dissenting position stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove what we all agree are protected acts which cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the Clause is inadmissible. The Government, as we have noted, need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which respondent was indicted. To accept the arguments of the dissent would be to retreat from the Court's position in *Johnson* that a Member may be convicted if no showing of legislative act is required.

MR. JUSTICE BRENNAN suggests that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in *Johnson*. That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson*, the Court held that on remand, Johnson could be retried on the conspiracy to defraud count, so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House speech. See n. 7, *supra*.

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The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities which are casually or incidentally related to legislative affairs but not a part of the legislative process itself. Under this indictment and these statutes no such proof is needed.

We hold that under this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause.¹⁸ Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

¹⁸ In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in *Johnson* as to the constitutionality of an inquiry that probes into legislative acts or the motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute. Should such an inquiry be made and should a conviction be sustained, then we would face the question whether inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant,	}	On Appeal from the United States District Court for the District of Columbia Circuit.
v.		
Daniel B. Brewster.		

[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

When this case first came before the Court, I had thought it presented a single, well-defined issue—that is, whether the Congress could authorize by a narrowly drawn statute the prosecution of a Senator or Representative for conduct otherwise immune from prosecution under the Speech or Debate Clause of the Constitution. Counts 1, 3, 5, and 7 of the indictment charged Senator Brewster with receiving \$19,000 “in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity [as a member of the Senate Post Office Committee].” Count 9 charged the Senator with receipt of another \$5,000 for acts already performed by him with respect to his “action, vote, and decision” on that legislation. These charges, it seemed to me, fell within the clear prohibition of the Speech or Debate Clause as interpreted by decisions of this Court, particularly *United States v. Johnson*, 383 U. S. 169 (1966). For if the indictment did not call into question the “speeches or debates” of the Senator, it certainly laid open to scrutiny the motives for his legislative acts; and those motives, I had supposed, were no more subject to Executive and Judicial inquiry than the acts

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themselves, unless, of course, the Congress could delegate such inquiry to the other branches.

That, apparently, was the Government's view of the case as well. At the hearing before the District Court the prosecutor was asked point blank whether "the indictment in any wise allege[d] that Brewster did anything not related to his purely legislative functions." The prosecutor responded:

"We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that." App. 28.

The Government, in other words, did not challenge the applicability of the Clause to these charges, but argued only that its prohibitions could be avoided, "waived" as it were, through congressional authorization in the form of a narrowly drawn bribery statute. The District Court accepted the Government's reading of the indictment and held that the Senator could not be prosecuted for this conduct even under the allegedly narrow provisions of 18 U. S. C. § 201:

"Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

"It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution

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for alleged bribery to perform a legislative act.”
App. 33.

Furthermore, the Government’s initial brief in this Court, doubtless reflecting its recognition that *Johnson* had rejected the analysis adopted by the Court today, did not argue that a prosecution for acceptance of a bribe in return for a promise to vote a certain way falls outside the prohibition of the Speech or Debate Clause. Rather, the Government’s Brief conceded or at least assumed that such conduct does constitute “Speech or Debate,” but urged that Congress may enact a statute, such as 18 U. S. C. § 201, providing for judicial trial of the alleged crime.

Given these admissions by the Government and the District Court’s construction of the indictment, which settled doctrine makes binding on this Court, *United States v. Jones*, 345 U. S. 377, 378 (1953), the only issue properly before us was whether Congress is empowered to delegate to the Executive and Judicial Branches the trial of a member for conduct otherwise protected by the Clause. Today, however, the Court finds it unnecessary to reach that issue, for it finds that the indictment, though charging receipt of a bribe for legislative acts, entails “no inquiry into legislative acts or motivation for legislative acts,” *ante*, at 24, and thus is not covered by the Clause. In doing so the Court permits the Government to recede from its firm admissions, it ignores the District Court’s binding construction of the indictment, and—most important—it repudiates principles of legislative freedom developed over the past century in a line of cases culminating in *Johnson*. Those principles, which are vital to the right of the people to be represented by Congressmen of independence and integrity, deserve more than the hasty burial given them by the Court today. I must therefore dissent.

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I

I would dispel at the outset any notion that Senator Brewster's asserted immunity strains the outer limits of the Clause. The Court writes at length in an effort to show that "Speech or Debate" does not cover "all conduct relating to the legislative process." *Ante*, at 14. Even assuming the validity of that conclusion, I fail to see its relevance to the instant case. Senator Brewster is not charged with conduct merely "relating to the legislative process," but with a crime whose proof calls into question the very motives behind his legislative acts. The indictment, then, lies not at the periphery but at the very center of the protection that this Court has said is provided a Congressman under the Clause.

Decisions of this Court dating as far back as 1881 have consistently refused to limit the concept of "legislative acts" to the "Speech or Debate" specifically mentioned in Art. I, § 6. In *Kilbourn v. Thompson*, 103 U. S. 168 (1881), the Court held that

"[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204.

In reaching its conclusion, the Court adopted what was said by the Supreme Judicial Court of Massachusetts in *Coffin v. Coffin*, 4 Mass. 1 (1808), which *Kilbourn* held to be perhaps "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies" *Ibid.*

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Chief Justice Parsons, speaking for the Massachusetts court, expressed what *Kilbourn* and later decisions saw as a properly generous view of the legislative privilege:

"These privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office: and I would define the article, as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber."

4 Mass., at 27.

There can be no doubt, therefore, that Senator Brewster's vote on new postal rates constituted legislative activity within the meaning of the Clause. The Senator could not be prosecuted or called to answer for his vote in any Judicial or Executive proceeding. But the Senator's immunity, I submit, goes beyond the vote itself and precludes all extra-congressional scrutiny as to how and why he cast, or would have cast, his vote a certain way. In *Tenney v. Brandhove*, 341 U. S. 367

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(1951), the plaintiff charged that a state legislative hearing was being conducted not for a proper legislative purpose but solely as a means of harassing him. Nevertheless the Court held that no action would lie against the committee members under federal civil rights statutes. Mr. Justice Frankfurter stated:

"The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned

". . . In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.*, at 377-378.

Barring congressional power to authorize this prosecution, what has been said thus far would seem sufficient to require affirmance of the order of dismissal, for neither Senator Brewster's vote nor his motives for voting, however dishonorable, may be the subject of a civil or criminal proceeding outside the walls of the Senate. There

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is nothing complicated about this conclusion. It follows simply and inescapably from prior decisions of this Court, *supra*, setting forth the most basic elements of legislative immunity. Yet the Court declines to apply those principles to this case, for it somehow finds that the Government can prove its case without referring to the Senator's official acts or motives. According to the Court, the Government can limit its proof on Counts 1, 3, 5, and 7 to evidence concerning Senator Brewster's "taking or agreeing to take money for a promise to act in a certain way," and need not show "that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Ante*, at 25. Similarly, the Court finds that Count 9 can be proved merely by showing that the Senator solicited or received money "with knowledge that the donor was paying him compensation for an official act," without any inquiry "into the legislative performance itself." *Ante*, at 26. These evidentiary limitations are deemed sufficient to avoid the prohibitions of the Speech or Debate Clause.

With all respect, I think that the Court has adopted a wholly artificial view of the charges before us. The indictment alleges not the mere receipt of money, but the receipt of money in exchange for a Senator's vote and promise to vote in a certain way. Insofar as these charges bear on votes already cast, the Government cannot avoid proving the performance of the bargained-for acts, for it is the acts themselves, together with the motivating bribe, that form the basis of Count 9 of the indictment. Proof of "knowledge that the donor was paying . . . for an official act" may be enough for conviction under § 201 (g). But assuming it is, the Government still must demonstrate that the "official act" referred to was actually performed, for that is what the indictment charges. Count 9, in other words, calls

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into question both the performance of official acts by the Senator and his reasons for voting as he did. Either inquiry violates the Speech or Debate Clause.

The counts charging only a corrupt promise to vote are equally repugnant to the clause. The Court may be correct that only receipt of the bribe, and not performance of the bargain, is needed to prove these counts. But proof of an agreement to be "influenced" in the performance of legislative acts is by definition an inquiry into their motives, whether or not the acts themselves or the circumstances surrounding them are questioned at trial. Furthermore, judicial inquiry into an alleged agreement of this kind carries with it the same dangers to legislative independence that are held to bar accountability for official conduct itself. As our Brother WHITE cogently states, *post*, at 6-7:

"Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain."

Thus, even if this were an issue of first impression, I would hold that this prosecution, being an extra-congressional inquiry into legislative acts and motives, is barred by the Speech or Debate Clause.

What is especially disturbing about the Court's result, however, is that this is not an issue of first impression, but one that was settled six years ago in *United States v. Johnson*, 383 U. S. 169 (1966). There a former Congressman was charged with violating the federal conflict-of-interest statute, 18 U. S. C. § 281, and of

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conspiring to defraud the United States, 18 U. S. C. § 371, by accepting a bribe in exchange for his agreement to seek dismissal of federal indictments pending against officers of several savings and loan companies. Part of the alleged conspiracy was a speech delivered by Johnson on the floor of the House, favorable to loan companies generally. The Government relied on that speech at trial and questioned Johnson extensively about its contents, authorship, and his reasons for delivering it. The Court of Appeals set aside the conspiracy conviction, holding that the Speech or Debate Clause barred such a prosecution based on an allegedly corrupt promise to deliver a congressional speech. In appealing that decision the Government made the very same argument that appears to persuade the Court today:

“[The rationale of the Clause] is applicable in suits based upon the *content* of a legislator’s speech or action, where immunity is necessary to prevent impediments to the free discharge of his public duties. But it does not justify granting him immunity from prosecution for accepting or agreeing to accept money to make a speech in Congress. The latter case poses no threat which could reasonably cause a Congressman to restrain himself in his official speech, because no speech, as such, is being questioned. It is only the *antecedent conduct* of accepting or agreeing to accept the bribe which is attacked in such a prosecution. ‘Whether the party taking the bribe lives up to his corrupt promise or not is immaterial. The agreement is the essence of the offense; when that is consummated, the offense is complete.’ 3 Wharton, Criminal Law and Procedure, § 1383 (Anderson ed. 1957) Thus, if respondent, after accepting the bribe, had failed to carry out his bargain, he could still be prosecuted for the same offense charged here, but it could not

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be argued that any speech was being 'questioned' in his prosecution. The fact that respondent fulfilled his bargain and delivered the corrupt speech should not render the entire course of conduct constitutionally protected." Brief for the United States in *United States v. Johnson*, at 10-11.

The *Johnson* opinion answered this argument in two places. After emphasizing that the prosecution at issue was "based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests," the Court stated, 383 U. S., at 180:

"However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. *The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.*" (Emphasis supplied.)

Again the Court stated, at 182-183:

"The Government argues that the clause was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.' Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broadest terms."

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Finally, any doubt that the *Johnson* Court rejected the argument put forward by the Government was dispelled by its citation of *Ex parte Wason*, 4 Q. B. 573 (1869). In that case a private citizen moved to require a magistrate to prosecute several members of the House of Lords for conspiring to prevent his petition from being heard on the floor. The court denied the motion, holding that "statements made by members of either House of Parliament in their places in the House . . . could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." *Id.*, at 576 (Cockburn, C. J.). Mr. Justice Blackburn added, "I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offense." *Ibid.*

Johnson, then, can only be read as holding that a corrupt agreement to perform legislative acts, even if provable without reference to the acts themselves, may not be the subject of a general conspiracy prosecution. In the face of that holding and *Johnson's* rejection of reasoning identical to its own, the Court finds support in the fact that *Johnson* "authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated." *Ante*, at 10. But the Court ignores the fact that, with the speech and its motives excluded from consideration, this new trial was for nothing more than a conspiracy to intervene before an Executive department, *i. e.*, the Justice Department. And such Executive intervention has never been considered legislative conduct entitled to the protection of the Speech or Debate Clause. See

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infra, at 14. The Court cannot camouflage its departure from the holding of *Johnson* by referring to a collateral ruling having little relevance to the fundamental issues of legislative privilege involved in that case. I would follow *Johnson* and hold that Senator Brewster's alleged promise, like the Congressman's there, is immune from executive or judicial inquiry.

II

The only issue for me, then, is the one left open in *Johnson*—that is, the validity of a “prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded [not upon a general conspiracy statute but] upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.” 383 U. S., at 185. Assuming that 18 U. S. C. § 201 is such a “narrowly drawn statute,” I do not believe that it, any more than a general enactment, can serve as the instrument for holding a Congressman accountable for his legislative acts outside the confines of his own chamber. The Government offers several reasons why such a “waiver” of legislative immunity should be allowed. None of these, it seems to me, is sufficient to override the public's interest in legislative independence, secured to it by the principles of the Speech or Debate Clause.¹

As a preliminary matter, the Government does not contend, nor can it, that no forum was provided in which Senator Brewster might have been punished if

¹ Although the Court does not reach this issue, it adopts many of the Government's arguments to show that the Speech or Debate Clause is or should be wholly inapplicable to this case. My disagreement with these contentions applies equally to their use by the Court in support of its position.

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guilty. Article I, § 5, of the Constitution provides that “. . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.” This power has a broad reach, extending “to all cases where the offense is such as in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member.” *In re Chapman*, 166 U. S. 661, 669–670 (1897). *Chapman*, for example, concerned a Senate investigation of charges that Senate members had speculated in stocks of companies interested in a pending tariff bill. Similarly, the House of Representatives in 1873 censured two members for accepting stock to forestall a congressional inquiry into the Credit Mobilier. There are also many instances of imprisonment or expulsion by Parliament of members who accepted bribes.²

Though conceding that the Houses of Congress are empowered to punish their members under Art. I, § 5, the Government urges that Congress may also enact a statute, such as 18 U. S. C. § 201, providing for judicial enforcement of that power. In support of this position, the Government relies primarily on the following language from the opinion in *Burton v. United States*, 202 U. S. 344, 367 (1906):

“While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes,

² See n. 4, *infra*, and accompanying text.

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not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it."

However, *Burton* was not a case that involved conduct protected by the Speech or Debate Clause. Senator Burton was prosecuted for accepting money to influence the Post Office Department in a mail fraud case in violation of Rev. Stat. 1782, 13 Stat. 123. That was nonlegislative conduct, and as we said in *Johnson*, *supra*, at 172, "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." Such a prosecution, as the quoted excerpt from *Burton* specifically said, is "not forbidden by the Constitution," but that holding has little relevance to a case, such as this one, involving legislative acts and motives.

The Government, however, cites additional considerations to support the authority of Congress to provide for judicial trials of corrupt members; the press of congressional business, the possibility of politically motivated judgments by fellow members, and the procedural safeguards of a judicial trial are all cited as reasons why Congress should be allowed to transfer the trial of a corrupt member from the Houses of Congress to the courts. Once again, these are arguments urged and found unpersuasive in *Johnson*. I find them no more persuasive now. I may assume as a general matter that the "Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U. S. 437, 445 (1965). Yet it does

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not necessarily follow that prosecutors, judges, and juries are better equipped than legislators to make the kinds of political judgments required here. Senators and Congressmen are never entirely free of political pressures, whether from their own constituents or from special interest lobbies. Submission to these pressures, in the hope of political and financial support, or the fear of its withdrawal, is not uncommon, nor is it necessarily unethical.³ The line between legitimate influence and outright bribe may be more a matter of emphasis than objective fact, and in the end may turn on the trier's view of what was proper in the context of the everyday realities and necessities of political office. Whatever the special competence of the judicial process in other areas, members of Congress themselves are likely to be in the better position to judge the issue of bribery relating to legislative acts. The observation of Mr. Justice Frankfurter bears repeating here: "Courts are not the place for such controversies. Self-discipline and

³ Cf. Conflict of Interest and Federal Service, Association of the Bar of the City of New York 14-15 (1960):

"The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry—though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable, and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflict of interest in Congress runs afoul of the basic premises of American representative government."

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the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney v. Brandhove, supra*, at 378.

Nor is the member at the mercy of his colleagues, free to adjust as they wish his rights to due process and free expression. It is doubtful, for example, that the Congress could punish a member for the mere expression of unpopular views otherwise protected by the First Amendment. See *Bond v. Floyd*, 385 U. S. 116 (1966). And judicial review of the legislative inquiry is not completely foreclosed; the power of the House and Senate to discipline the conduct of members is not exempt from the "restraints imposed by or found in the implications of the Constitution." *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 614 (1929), quoted in *Powell v. McCormack*, 395 U. S. 486, 519 n. 40 (1969).

Finally, the Government relies on the history of the Clause to support a congressional power of delegation. While agreeing that the Speech or Debate Clause was a "culmination of a long struggle for parliamentary supremacy" and a reaction against the Crown's use of "criminal and civil law to suppress and intimidate critical legislators," *Johnson, supra*, at 178, the Government urges that this is not the whole story. It points out that while a large part of British history was taken up with Parliament's struggles to free itself from royal domination, the balance of power was not always ranged against it. Once Parliament succeeded in asserting rightful dominion over its members and the conduct of its business, Parliament sought to extend its reach into areas and for purposes that can only be labeled an abuse of legislative power. Aware of these abuses, the Framers, the Government submits, did not mean Congress to have exclusive power, but one which, by congressional delegation, might be shared with the Executive and Judicial Departments.

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That the Parliamentary privilege was indeed abused is historical fact. By the close of the 17th century Parliament had succeeded in obtaining rights of free speech and debate as well as the power to punish offenses of its members contravening the good order and integrity of its processes. In 1694, five years after incorporation of the Speech or Debate Clause in the English Bill of Rights, Lord Falkland was found guilty in Commons of accepting a bribe of 2,000 pounds from the Crown, and was imprisoned during the pleasure of the House. The Speaker of the House of Commons, Sir John Trevor, was censured for bribery the following year.⁴

But Parliament was not content with mere control over its members' conduct. Independence brought an assertion of absolute power over the definition and reach of institutional privileges. "[T]he House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as *lex parliamenti*. Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege." *Watkins v. United States*, 354 U. S. 178, 188 (1957). Thus, having established the basic privilege of its members to be free from civil arrest or punishment, the House extended the privilege to its members' servants, and punished trespass on the estates of its members, or theft of their or their servants' goods. The House went so far as to declare its members' servants to be outside the reach of the common law courts during the time that Par-

⁴ Luce, *Legislative Assemblies* 401-402 (1924). Another notable instance was that of Robert Walpole, who in 1711 was expelled and imprisoned by the House on charges of corruption. Tasswell-Langmead, *English Constitutional History* 583-584 (11th ed., Plucknett, 1960).

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liament was sitting. This led to the sale of "protections" providing that named persons were servants of a particular member and should be free from arrest, imprisonment, and molestation during the term of Parliament.⁵ These abuses in turn were brought to America. By 1662, for example, the Virginia House of Burgesses had succeeded in exempting not only its members, but their servants as well, from arrest and molestation.⁶

The Government is correct in pointing out that the Framers, aware of these abuses, were determined to guard against them. Madison stated that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."⁷ And Jefferson looked on the "tyranny of the legislatures" as "the most formidable dread at present, and will be for long years."⁸ Therefore the Framers refused to adopt the *lex parliamenti*, which would have allowed Congressmen and their servants to enjoy numerous im-

⁵ Wittke, *The History of English Parliamentary Privilege* 39-47 (1921); Tasswell-Langmead, *English Constitutional History* 580 (11th ed., Plucknett, 1960). The abuse of the privilege lay as much in its arbitrary contraction as extension. In 1763 the House of Commons reacted angrily to a tract written by one of its own members, John Wilkes, and withdrew the privilege from him in order to permit his prosecution for seditious libel. The House also expelled Wilkes, and he fled to France as an outlaw. Upon his return to England in 1768, he was re-elected to Parliament, again expelled, tried for seditious libel, and sentenced to 22 months imprisonment. The House refused to seat him on three further occasions, and it was not until 1782 that the resolutions expelling Wilkes and declaring him incapable of re-election were expunged from the records of the House. Tasswell-Langmead, *supra*, at 584-585; *Powell v. McCormack*, 395 U. S. 486, 527-528 (1969).

⁶ Clarke, *Parliamentary Privilege in the American Colonies* 99 (1943).

⁷ *The Federalist* No. 48.

⁸ *Tenney v. Brandhove*, 341 U. S. 367, 375 n. 4 (1951).

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munities from ordinary legal restraints. But it does not follow that the Framers went further and authorized Congress to transfer discipline of bribe takers to the Judicial Branch. The Government refers us to nothing in the Convention debates or in writings of the Framers that even remotely supports the argument. Indeed there is much in the history of the Clause to point the other way, toward a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts.

The *Johnson* opinion details the history. The Clause was formulated by the Convention's Committee on Style, which phrased it by revising Article V of the Articles of Confederation which had provided: "Freedom of speech and debate in Congress shall not be impeached or questioned *in any court*, or place out of Congress." (Emphasis supplied.) This wording derived in turn from the provision of the English Bill of Rights of 1689 that "Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court or Place out of Parliament*." (Emphasis supplied.) The same wording, or variations of it, appeared in state constitutions. Article VIII of the Maryland Declaration of Rights (1776) declared that legislative freedom "ought not to be impeached or questioned in any other court or judicature." The Massachusetts Bill of Rights (Article XXI, 1780) provided that the "freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." The New Hampshire Constitution (Article XXX, 1784) contained a provision virtually identical to Massachusetts'. In short "[f]reedom of speech and action in the legislature was taken as a mat-

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ter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U. S., at 372.

Despite his fear of "legislative excess," *Tenney v. Brandhove*, *supra*, at 375, Jefferson, when confronted with criticism of certain Congressmen by the Richmond, Virginia, grand jury, said:

"[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 8 *The Works of Thomas Jefferson* 322 (Ford ed. 1904).

Jefferson's point of view was shared by his contemporaries⁹ and found judicial expression as early as 1808, in the *Coffin* opinion, *supra*. It was there stated:

"In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, *even against the declared will of the house*. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches

⁹ James Wilson, a member of the Convention committee responsible for the Clause, stated: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 *The Works of James Wilson* 421 (McCloskey ed. 1967).

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of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature." 4 Mass., at 27. (Emphasis supplied.)

In short, if the Framers contemplated judicial inquiry into legislative acts, even on the specific authorization of Congress, that intent is not reflected in the language of the Speech or Debate Clause or contemporary understanding of legislative privilege. History certainly shows that the Framers feared unbridled legislative power. That fact, however, yields no basis for an interpretation that in Article I, §§ 1 and 8, the Framers authorized Congress to ignore the prohibition against inquiry in "any other place" and enact a statute either of general application or specifically providing for a trial in the courts of a member who takes a bribe for conduct related to legislative acts.¹⁰

III

I yield nothing to the Court in conviction that this reprehensible and outrageous conduct, if committed by

¹⁰ While it is true that Congress has made the acceptance of a bribe a crime ever since 1853, it should be noted that the earliest federal bribery statute, passed by Congress in 1790, applied only to judges who took bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, 1 Stat. 112, 117. It also appears that the common law did not recognize the charge of bribe-taking by a legislator. Blackstone, for example, defined bribery as "when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office." 4 Blackstone's Commentaries 139. Coke also regarded bribery as a crime committed by judges. Coke, 3d Inst. 145.

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the Senator, should not have gone unpunished. But whether a court or only the Senate might undertake the task is a constitutional issue of portentous significance which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. It is no answer that Congress assigned the task to the judiciary in enacting 18 U. S. C. § 201. Our duty is to Nation and Constitution, not Congress. We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior in the performance of legislative functions was accountable solely to a member's own House and never to the executive or judiciary. The passing years have amply justified the wisdom of that judgment. It is the Court's duty to enforce the letter of the Speech or Debate Clause in that spirit. We did so in deciding *Johnson*. In turning its back on that decision today, the Court arrogates to the judiciary an authority committed by the Constitution, in Senator Brewster's case, exclusively to the Senate of the United States. Yet the Court provides no principled justification, and I can think of none, for its denial that *United States v. Johnson* compels affirmance of the District Court. That decision is only six years old and bears the indelible imprint of the distinguished constitutional scholar who wrote the opinion for the Court. *Johnson* surely merited a longer life.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant,	}	On Appeal from the United States District Court for the District of Columbia Circuit.
v.		
Daniel B. Brewster.		

[June 29, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The question presented by this case is not whether bribery or other offensive conduct on the part of Members of Congress must or should go unpunished. No one suggests that the Speech or Debate Clause insulates Senators and Congressmen from accountability for their misdeeds. Indeed, the clause itself is but one of several constitutional provisions which makes clear that Congress has broad powers to try and punish its Members:

“the Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

“So, also, the penalty which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

“Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases;

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and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

“The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.” *Kilbourn v. Thompson*, 103 U. S. 168, 189–190 (1881).

The sole issue here is in what forum the accounting must take place—whether the prosecution which the Government proposes is consistent with the command that “for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place.” U. S. Constitution, Art. I, § 6, cl. 2.

The majority disposes of this issue by distinguishing between promise and performance. Even if a Senator or Congressman may not be prosecuted for a corrupt legislative act, the Speech or Debate Clause does not prohibit prosecution for a corrupt promise to perform that act. If a Member of Congress promises to vote for or against a bill in return for money, casts his vote in accordance with the promise and accepts payment, the majority’s view is that even though he may not be prosecuted for voting as he did, although the vote was corrupt, the executive may prosecute and the judiciary may try him for the corrupt agreement or for taking the money either under a narrowly drawn statute or one of general application. This distinction between a promise

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and an act will not withstand scrutiny in terms of the values which the Speech or Debate Clause was designed to secure.

The majority agrees that in order to assure the independence and integrity of the legislature and to reinforce the separation of powers so deliberately established by the founders, the Speech or Debate Clause prevents a legislative act from being the basis of criminal or civil liability. Concededly, a Member of Congress may not be prosecuted or sued *for* making a speech or voting in committee or on the floor, whether he was paid to do so or not. The majority also appears to embrace the holding in *United States v. Johnson*, 383 U. S. 169 (1966), that a Member of Congress could not be convicted of a conspiracy to defraud the Government where the purposes or motives underlying his conduct as a legislator are called into question. If one follows the mode of the majority's present analysis, the prosecution in *Johnson* was not for speaking, voting or performing any other legislative act in a particular manner; the criminal act charged was a conspiracy to defraud the United States anterior to any legislative performance. To prove the crime, however, the prosecution introduced evidence that money was paid to make a speech, among other things, and that the speech was made. This, the Court held, violated the Speech or Debate Clause, because it called into question the motives and purposes underlying Congressman Johnson's performance of his legislative duties.

The same infirmity inheres in the present indictment, which was founded upon two separate statutes. 18 U. S. C. § 201 (g) requires proof of a defendant's receipt or an agreement or attempt to receive anything of value "for or because of any official act performed, or to be performed, by him" Of course, not all, or even many, official acts would be legislative acts protected by the Speech or Debate Clause; but whatever the act, the

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Government must identify it to prove its case. Here we are left in no doubt whatsoever, for the official acts expressly charged in the indictment were in respect to "his action, vote and decision on postal rate legislation." Similarly, there is no basis for arguing that the indictment did not contemplate proof of performance of the act, for the indictment in so many words charged the arrangement was "for and because of official acts *performed* by him in respect to his action, vote and decision on postal rate legislation which *had been pending* before him in his official capacity." (Emphasis added.) It is this indictment, not some other charge, that was challenged and dismissed by the District Court. Like that court I would take the Government at its word: it alleged and intended to prove facts that questioned and impugned the motives and purposes underlying specified legislative acts of the Senator and intended to use these facts as a basis for the conviction of the Senator himself. Thus, taking the charge at face value, the indictment represents an attempt to prosecute and convict a Member of Congress not only for taking money but *for performing* a legislative act. Moreover, whatever the proof might be, the indictment on its face charged a corrupt undertaking with respect to the performance of legislative conduct that had already occurred and so, without more, "questioned in [some] other Place" the speech and debate of a Member of Congress. Such a charge is precisely the kind that the Senator should not have been called upon to answer if the Speech or Debate Clause is to fulfill its stated purpose.

Insofar as it charged crimes under 18 U. S. C. § 201 (c)(1), the indictment fares little better. That section requires proof of a corrupt arrangement for the receipt of money and also proof that the arrangement was in return for the defendant "being influenced in his performance of any official act" Whatever the official act may prove

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to be, the Government cannot prove its case without calling into question the motives of the Member in performing that act, for it must prove that the Member undertook for money to be influenced in that performance. Clearly, if the Government sought to prove its case against a Member of Congress by evidence of a legislative act, conviction could not survive in the face of the holding in *Johnson*. But even if an offense under the statute could be established merely by proof of an undertaking to cast a vote, which is not alleged in the indictment or shown at trial to have taken place one way or the other, the motives of the legislator in performing his duties with respect to the subject matter of the undertaking would nevertheless inevitably be impugned. In charging the offense under § 201 (c)(1), the indictment alleged a corrupt arrangement made "in return for being influenced in his performance of official acts in respect to his action, vote and decision on postal legislation which might at any time be pending before him in his official capacity." Again, I would take the Government at its word: it charged and intended to prove facts that could not fail to impugn Senator Brewster's performance of his legislative duties.*

The use of criminal charges "against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege," *United States v. Johnson*, 383 U. S. 169, 182 (1966), and in applying the privilege "we look

*In *Gravel v. United States*, *ante*, at —, it is held that the Speech or Debate Clause does not immunize criminal acts performed in preparation for or execution of a legislative act. But the unprotected acts referred to there were criminal in themselves, provable without reference to a legislative act and without putting the defendant member to the task of defending the integrity of his legislative performance. Here, as stated, the crime charged necessarily implicates the Member's legislative duties.

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particularly to the prophylactic purposes of the clause." *Ibid.* Let us suppose that the Executive Branch is informed that private interests are paying a Member of Congress to oppose administration-sponsored legislation. The Congressman is chairman of a key committee where a vote is pending. A representative from the Executive department informs the Congressman of the allegations against him, hopes the charges are not true and expresses confidence that the committee will report the bill and that the Member will support it on the floor. The pressure on the Congressmen, corrupt or not, is undeniable. He will clearly fare better in any future criminal prosecution if he answers the charge of corruption with evidence that he voted contrary to the alleged bargain. Even more compelling is the likelihood that he will not be prosecuted at all if he follows the administration's suggestion and supports the bill. Putting aside the potential for abuse in ill-conceived, mistaken or false accusations, the Speech or Debate Clause was designed to prevent just such an exercise of Executive power. It is no answer to maintain that the potential for abuse does not inhere in a prosecution for a completed bribery transaction where the legislative act has already occurred. A corrupt vote may not be made the object of a criminal prosecution because otherwise the Executive would be armed with power to control the vote in question, if forewarned, or in any event to control other legislative conduct.

All of this comes to naught if the executive may prosecute for a promise to vote though not for the vote itself. The same hazards to legislative independence inhere in the two prosecutions. Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote,

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whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain.

The realities of the American political system, of which the majority fails to take account, render particularly illusory a Speech or Debate Clause distinction between a promise to perform a legislative act and the act itself. Ours is a representative government. Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on platforms which include statements of intention and undertakings to promote certain policies. These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters, but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.

Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

Against this background a second fact of American political life assumes considerable importance for the purposes of this case. Congressional campaigns are most often financed with contributions from those interested

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in supporting particular Congressmen and their policies. A legislator must maintain a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaigns. He must also keep in mind the potential effect of his conduct upon those from whom he has received financial support in the past and those whose help he expects or hopes to have in the next campaign. An expectation or hope of future assistance can arise because constituents have indicated that support will be forthcoming if the Member of Congress champions their point of view. Financial support may also arrive later from those who approve of a Congressman's conduct and have an expectation it will continue. Thus, mutuality of support between legislator and constituent is inevitable. Constituent contributions to a Congressman and his support of constituent interests will repeatedly coincide in time or closely follow one another. It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported, or will support, by speech making, voting or bargaining with fellow legislators.

All of this, or most of it, may be wholly within the law and consistent with contemporary standards of political ethics. Nevertheless, the opportunities for an executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution—precisely the evil which the Speech or Debate Clause was designed to prevent.

Neither the majority opinion nor the statute under which Brewster is charged distinguishes between campaign contributions and payments designed for or put

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to personal use. To arm the executive with the power to prosecute for taking political contributions in return for an agreement to introduce or support particular legislation or policies is to vest enormous leverage in the executive and the courts. Members of Congress may find themselves in the dilemma of being forced to conduct themselves contrary to the interests of those who provide financial support or declining that support. They may also feel constrained to listen less often to the entreaties and demands of potential contributors. The threat of prosecution for supposed missteps which are difficult to define and fall close to the line of what ordinarily is considered permissible, even necessary, conduct scarcely ensures that legislative independence which is the root of the Speech and Debate Clause.

Even if the statute and this indictment were deemed limited to payments clearly destined for or actually put to personal use in exchange for a promise to perform a legislative act, the Speech and Debate Clause would still be offended. The potential for executive harassment is not diminished merely because the conduct made criminal is more clearly defined. A Member of Congress becomes vulnerable to abuse each time he makes a promise to a constituent on a matter over which he has some degree of legislative power, and the possibility of harassment can inhibit his exercise of power as well as his relations with constituents. In addition, such a prosecution presents the difficulty of defining when money obtained by a legislator is destined for or has been put to personal use. For the legislator who uses both personal funds and campaign contributions to maintain himself in office the choice of which to draw upon may have more to do with bookkeeping than bribery yet any interchange of funds would certainly render his conduct suspect. Even those Members of Congress who keep separate accounts for campaign contributions but retain

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unrestricted drawing rights would remain open to a charge that the money was in fact for personal use. In both cases the possibility of a bribery prosecution presents the problem of determining exactly those purposes for which campaign contributions can legitimately be used. The difficulty of drawing workable lines enhances the prospects for Executive control and correspondingly diminishes congressional freedom of action.

The majority does not deny the potential for executive control which inheres in sanctioning this prosecution. Instead, it purports to define the problem away by asserting that the Speech or Debate Clause reaches only prosecutions for legislative conduct and that a promise to vote for a bill, as distinguished from the vote itself, does not amount to a legislative act. The implication is that a prosecution based upon a corrupt promise no more offends the Speech or Debate Clause than the prosecution of a Congressman for assault, robbery or murder. The power to prosecute may threaten legislative independence but the Constitution does not for that reason forbid it. I find this unpersuasive.

The fact that the executive may prosecute members of Congress for ordinary criminal conduct, which surely it can despite the potential for influencing legislative conduct, cannot itself demonstrate that prosecutions for corrupt promises to perform legislative acts would be equally constitutional. The argument proves too much, for it would as surely authorize prosecutions for the legislative act itself. Moreover, there is a fundamental difference in terms of potential abuse between prosecutions for ordinary crime and those based upon a promise to perform a legislative act. Even the most vocal detractor of Congress could not accurately maintain that the executive would often have credible basis for accusing a member of Congress of murder, theft, rape or other such crimes. But the prospects for asserting an argu-

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ably valid claim are far wider in scope for an executive prone to fish in legislative waters and to search for correlations between legislative performance and financial support. The possibilities are indeed endless, as is the potential for abuse.

The majority ignores another vital difference between executive authority to prosecute for ordinary crime and the power to challenge undertakings or conspiracies to corrupt the legislative process. In a prosecution for drunken driving or assault, the manner in which a Congressman performed his legislative tasks is quite irrelevant to either prosecution or defense. In the trial of a Congressman for making a corrupt promise to vote, on the other hand, proof that his vote was in fact contrary to the terms of the alleged bargain will make a strong defense. Cf. *United States v. Johnson*, 383 U. S. 169, 176-177 (1966). A Congressman who knows he is under investigation for a corrupt undertaking will be well advised to conduct his affairs in a manner wholly at odds with the theory of the charge which may be lodged against him. As a practical matter, to prosecute a Congressman for agreeing to accept money in exchange for a promise to perform a legislative act inherently implicates legislative conduct. And to divine a distinction between promise and performance is wholly at odds with protecting that legislative independence which is the heart of the Speech and Debate Clause.

Congress itself clearly did not make the distinction which the majority finds dispositive. The statute before us is a comprehensive effort to sanitize the legislative environment. It expressly permits prosecutions of members of Congress for voting or promising to vote in exchange for money. The statute does not concern itself with murder or other undertakings unrelated to the legislative process. Congress no doubt believed it consistent with the Speech or Debate Clause to authorize execu-

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tive prosecutions for corrupt voting. Equally obvious is the fact that Congress drew no distinction in legislative terms between prosecutions based upon voting and those based upon motivations underlying legislative conduct.

The arguments which the majority now embraces were the very contentions which the Government made in *United States v. Johnson*, 383 U. S. 169 (1966). In rejecting those arguments on the facts of that case, where legislative conduct as well as a prior conspiracy formed a major part of the Government's proof, the Court referred with approval to *Ex parte Wason*, [1869] 4 Q. B. 573, in which the question was whether members of the House of Lords could be prosecuted for a conspiracy to prevent presentation of a petition on the floor of Lords. *Johnson*, *id.*, at 183, sets out the reaction of the English court:

"The court denied the motion, stating that statements made in the House 'could not be made the foundation of civil or criminal proceedings And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law.' *Id.*, at 576 (Cockburn, C. J.). Mr. Justice Lush added, 'I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.' *Id.*, at 577."

The *Wason* court clearly refused to distinguish between promise and performance; the legislative privilege applied to both. Mr. Justice Harlan, writing for the Court in *Johnson*, took no issue with this position. Indeed, he indicated that the Speech or Debate Clause barred any prosecution under a general statute where there is

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drawn in question "the legislative acts of . . . the member of Congress *or his motives for performing them.*" 383 U. S., at 185 (emphasis added). I find it difficult to believe that under the statute there involved the *Johnson* Court would have permitted a prosecution based upon a promise to perform a legislative act.

Because it gives a begrudging interpretation to the clause, the majority finds it can avoid dealing with the position upon which the Government placed principal reliance in its brief in this Court. *Johnson* put aside the question whether an otherwise impermissible prosecution conducted pursuant to a statute such as we now have before us—a statute specifically including congressional conduct and purporting to be an exercise of congressional power to discipline its Members—would be consistent with the Speech or Debate Clause. As must be apparent from what so far has been said, I am convinced that such a statute contravenes the letter and purpose of the Clause. True, Congress itself has defined the crime and specifically delegated to the executive the discretion to prosecute and to the courts the power to try. Nonetheless, I fail to understand how a majority of Congress can bind an objecting Congressman to a course so clearly at odds with the constitutional command that legislative conduct shall be subject to question in no place other than the Senate or House of Representatives. The Speech or Debate Clause is an allocation of power. It authorizes Congress to call offending members to account in their appropriate Houses. A statute which represents an abdication of that power is in my view impermissible.

I return to the beginning. The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process.

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRAVEL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 71-1017. Argued April 19-20, 1972—Decided June 29, 1972*

A United States Senator read to a subcommittee from classified documents (the Pentagon Papers), which he then placed in the public record. The press reported that the Senator had arranged for private publication of the Papers. A grand jury investigating whether violations of federal law were implicated, subpoenaed an aide to the Senator. The Senator, as an intervenor, moved to quash the subpoena, contending that it would violate the Speech or Debate Clause to compel the aide to testify. The District Court denied the motion but limited the questioning of the aide. The Court of Appeals affirmed the denial but modified the protective order, ruling that congressional aides and other persons may not be questioned regarding legislative acts and that, though the private publication was not constitutionally protected, a common-law privilege similar to the privilege of protecting executive officials from liability for libel, see *Barr v. Matteo*, 360 U. S. 564, barred questioning the aide concerning such publication.
Held:

1. The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. *Kilbourn v. Thompson*, 103 U. S. 168; *Dombrowski v. Eastland*, 387 U. S. 82; and *Powell v. McCormack*, 395 U. S. 486, distinguished. Pp. 7-15.

2. The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon

*Together with No. 71-1026, *United States v. Gravel*, also on certiorari to the same court.

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Syllabus

Papers, as such publication had no connection with the legislative process. Pp. 15-20.

3. The aide, similarly, had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Papers violated federal law. P. 20.

4. The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. And the aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Pp. 20-22.

455 F. 2d 753, vacated and remanded.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion dissenting in part. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
 Senator,
 71-1017 v.
 United States.
 United States, Petitioner,
 71-1026 v.
 Mike Gravel, United States
 Senator.

On Writs of Certiorari to
 the United States Court
 of Appeals for the First
 Circuit.

[June 29, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy." This document, popularly known as the "Pentagon Papers," bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U. S. C. § 641), the gathering and transmitting of national defense information (18 U. S. C. § 793), the concealment or removal of public records or documents (18 U. S. C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U. S. C. § 371).

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska

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and a resident fellow at the Institute of Policy Studies, and Howard Webber, Director of M. I. T. Press. Senator Gravel, as intervenor,¹ filed motions to quash the subpoenas and to require the Government to specify the particular questions to be addressed to Rodberg.² He asserted that requiring these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1.

It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers.

¹ The District Court permitted Senator Gravel to intervene in the proceeding on Dr. Rodberg's motion to quash the subpoena ordering his appearance before the grand jury and accepted motions from Gravel to quash the subpoena and to specify the exact nature of the questions to be asked Rodberg. The Government contested Gravel's standing to appeal the trial court's disposition of these motions on the ground that, had the subpoena been directed to the Senator, he could not have appealed from a denial of a motion to quash without first refusing to comply with the subpoena and being held in contempt. *United States v. Ryan*, 402 U. S. 530 (1971); *Cobbledick v. United States*, 309 U. S. 323 (1940). The Court of Appeals, *United States v. Doe*, 455 F. 2d 753, 756-757 (CA1 1972), held that because the subpoena was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be "powerless to avert the mischief of the order" if not permitted to appeal, citing *Perlman v. United States*, 247 U. S. 7, 13 (1918). The United States does not here challenge the propriety of the appeal.

² Dr. Rodberg, who filed his own motion to quash the subpoena directing his appearance and testimony, appeared as *amicus curiae* both in the Court of Appeals and this Court. Technically, Rodberg states, he is a party to 71-1026, insofar as the Government appeals from the protective order entered by the District Court. However, since Gravel intervened, Rodberg does not press the point. Brief of Leonard S. Rodberg as *Amicus Curiae* 2, n. 2.

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He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing.³ Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon Press⁴ and that members of Gravel's staff had talked with Webber as editor of M. I. T. Press.⁵

The District Court overruled the motions to quash and to specify questions but entered an order proscribing certain categories of questions. *United States v. Doe*, 332 F. Supp. 930 (Mass. 1971). The Government's contention that for purposes of applying the Speech or Debate Clause the courts were free to inquire into the regularity of the subcommittee meeting was rejected.⁶ Because the Clause protected all legislative

³ The District Court found "that, 'as personal assistant to movant [Gravel], Dr. Rodberg assisted in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'" *United States v. Doe*, 332 F. Supp. 930, 932 (Mass. 1971).

⁴ Beacon Press is a division of the Unitarian Universalist Association, which appeared here as *amicus curiae* in support of the position taken by Senator Gravel.

⁵ Gravel so alleged in his motion to intervene in the Webber matter and to quash the subpoena ordering Webber to appear and testify. App. 15-18.

⁶ The Government maintained that Congress does not enjoy unlimited power to conduct business and that judicial review has often been exercised to curb extra-legislative incursions by legislative committees, citing *Watkins v. United States*, 354 U. S. 178 (1957); *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Hentoff v. Ichord*, 318 F. Supp. 1175 (CADC 1970), at least where such incursions are unrelated to a legitimate legislative purpose. It was alleged that Gravel had "convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and there-

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acts, it was held to shield from inquiry anything the Senator did at the subcommittee meeting and "certain acts done in preparation therefor." *Id.*, at 935. The Senator's privilege also prohibited "inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Id.*, at 937-938.⁷ The trial court, however, held the private republication of the documents was not privileged by the Speech or Debate Clause.⁸

after placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication after the meeting." App. 9. The District Court rejected the contention: "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting inquiry into matters of legislative purpose and operations." *United States v. Doe*, 332 F. Supp. 930, 935 (Mass. 1971). Cases such as *Watkins*, *supra*, were distinguished on the ground that they concerned the power of Congress under the Constitution: "It has not been suggested by the government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive.'" *Id.*, at 736.

⁷ The District Court thought that Rodberg could be questioned concerning his own conduct prior to joining the Senator's staff and concerning the activities of third parties with whom Rodberg and Gravel dealt. *United States v. Doe*, 332 F. Supp. 930, 934 (Mass. 1971).

⁸ The protective order entered by the District Court provided as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator

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The Court of Appeals affirmed the denial of the motions to quash but modified the protective order to reflect its own views of the scope of the congressional privilege. *United States v. Doe*, 455 F. 2d 753 (CA1 1972). Agreeing that Senator and aide were one for the purposes of the Speech or Debate Clause and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative duties.⁹ Although it did not consider private republication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common law privilege akin to the judicially created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. See *Barr v. Matteo*, 360 U. S. 564 (1959). This privilege, fashioned by the Court of Appeals, would not

Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

⁹ The Court of Appeals thought third parties could be questioned as to their own conduct regarding the Pentagon Papers, "including their dealing with intervenors or his aides." *United States v. Doe*, 455 F. 2d 753, 761 (CA1 1972). The court found no merit in the claim that such parties should be shielded from questioning under the Speech or Debate Clause concerning their own wrongful acts, even if such questioning may bring the Senator's conduct into question. *Id.*, at 758, n. 2.

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protect third parties from similar inquiries before the grand jury. As modified by the Court of Appeals, the protective order to be observed by prosecution and grand jury was:

“(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel’s conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator’s conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

“(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel’s personal staff to the extent that they were in the course of his employment.”

The United States petitioned for certiorari challenging the ruling that aides and other persons may not be questioned with respect to legislative acts and that an aide to a Member of Congress has a common-law privilege not to testify before a grand jury with respect to private republication of materials introduced into a subcommittee record. Senator Gravel also petitioned for certiorari seeking reversal of the Court of Appeals insofar as it held private republication unprotected by the Speech or Debate Clause and asserting that the protective order of the Court of Appeals too narrowly

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protected against inquiries that a grand jury could direct to third parties. We granted both petitions. 405 U. S. 916 (1972).

I

Because the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime. Our frame of reference is Art. I, § 6, cl. 1, of the Constitution:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The last sentence of the clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long v. Ansell*, 293 U. S. 76, 83 (1934) (footnote omitted). "Since . . . the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of privilege all criminal offenses,

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the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit" *Williamson v. United States*, 207 U. S. 425, 446 (1908).¹⁰ Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, *Long v. Ansell*, *supra*, at 82-83, or as a witness in a criminal case. "The constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." *United States v. Cooper*, 4 Dall. 341 (1800) (per Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. *Williamson v. United States*, *supra*; cf. *Burton v. United States*, 202 U. S. 344 (1906). Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. Jefferson, *Manual of Parliamentary Practice*, S. Doc. No. 91-2 437 (1971).

In recognition, no doubt, of the force of this part of Clause 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points

¹⁰ *Williamson*, United States Congressman, had been found guilty of conspiring to commit subornation of perjury in connection with proceedings for the purchase of public land. He objected to the court passing sentence upon him and particularly protested that any imprisonment would deprive him of his constitutional right to "go to, attend at and return from the ensuing session of Congress." *Williamson v. United States*, 207 U. S. 425, 432-433 (1908). The Court rejected the contention that the Speech or Debate Clause freed legislators from accountability for criminal conduct.

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out that the last portion of Clause 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of Clause 6 generally permits prosecutions for treason, felony and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a coequal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

Even so, the United States strongly urges that because the Speech or Debate Clause confers a privilege only upon “Senators and Representatives,” Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position. We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be “treated as one,” *United States v. Doe*, 455 F. 2d 753, 761 (CA1 1972); or, as the District Court put it: The “Speech or Debate Clause prohibits inquiry into things done by

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Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States v. Doe*, 332 F. Supp. 930, 937-938 (Mass. 1971). Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

The Court has already embraced similar views in *Barr v. Matteo*, 360 U. S. 564 (1959), where in immunizing the Acting Director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release, the Court held that the executive privilege recognized in prior cases could not be restricted to those of cabinet rank. As stated by Mr. Justice Harlan, the "privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and re-delegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.*, at 572-573 (footnote omitted).

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It is true that the clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1881), quoted with approval in *United States v. Johnson*, 383 U. S. 169, 179 (1966). Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threaten to control his conduct as a legislator. We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

Nor can we agree with the United States that our conclusion is foreclosed by *Kilbourn v. Thompson*, *supra*, *Dombrowski v. Eastland*, 387 U. S. 82 (1967), and *Powell v. McCormack*, 395 U. S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the clause when they perform or aid in the performance of legislative acts. In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in na-

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ture. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. The Court quoted with approval from *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839): "So if the Speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer," 103 U. S., at 202.¹¹ The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act. The Court was careful to point out that the Members themselves were not implicated in the actual arrest, *id.*, at 200, and, significantly enough, reserved the question whether there might be circumstances in which "there may . . . be things done, *in the one House or the other*, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U. S., at 204 (emphasis added).

Dombrowski v. Eastland, *supra*, is little different in principle. The Speech or Debate Clause there protected

¹¹ In *Kilbourn*, 103 U. S., at 198, the Court noted a second example, used by Mr. Justice Coleridge in *Stockdale*, 9 Ad. & E., at 225-226, 112 K. B., at 1196-1197: "Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. . . . In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this."

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a Senator, who was also a subcommittee chairman, but not the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity that could result in liability, 387 U. S., at 84, whereas the committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records which the committee sought for its own proceedings. *Ibid.* The committee counsel was deemed protected to some extent by legislative privilege, but it did not shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize.

Powell v. McCormack reasserted judicial power to determine the validity of legislative actions impinging on individual rights—there the illegal exclusion of a representative-elect—and to afford relief against House aides seeking to implement the invalid resolutions. The Members themselves were dismissed from the case because shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it. As in *Kilbourn*, the Court did not reach the question “whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agent participated in the challenged action and no other remedy was available.” 395 U. S., at 506 n. 26.

None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. The three cases reflect a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional con-

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duct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in *Eastland*, the committee counsel was gathering information for a hearing; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in *Eastland*, as in this case, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson*, 383 U. S. 169 (1966).¹²

¹² Senator Gravel is willing to assume that if he personally had "stolen" the Pentagon Papers, and that act were a crime, he could be prosecuted, as could aides or other assistants who participated in the theft. Consolidated Brief of Senator Gravel 93.

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The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,¹³ and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

II

We are convinced also that the Court of Appeals correctly determined that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution.

¹³ It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator.

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Historically the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House. *Stockdale v. Hansard*, 9 Ad. & E. 1, 114, 112 K. B. 1112, 1156 (1839), recognized that "[f]or speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity." But it was clearly stated that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher."¹⁴

¹⁴ *Stockdale* extensively reviewed the precedents and their interplay with the privilege so forcefully recognized in the Bill of Rights of 1689: "That the freedom of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament." 1 W. & M., Sess. 2. c. 2. From these cases, include *Rex v. Creevy*, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813); *Rex v. Wright*, 8 T. R. 293, 101 K. B. 1396 (1799); *Rex v. Abingdon*, 1 ESP. 226, N. P. Cas. 337 (K. B. 1794); *Rex v. Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048, it is apparent that to the extent English precedent is relevant to the Speech or Debate Clause there is little, if any, support for Senator Gravel's position with respect to republication. Parliament reacted to *Stockdale v. Hansard* by adopting the Parliamentary Papers Act of 1840, 3 and 4 Viet., c. 9, which stayed proceedings in all cases where it could be shown that publication was by order of a House of Parliament and was a bona fide report, printed and circulated without malice. See generally C. Wittke, *The History of English Parliamentary Privilege* (1921).

Gravel urges that *Stockdale v. Hansard* was later repudiated in *Wason v. Walter*, [1868] 4 Q. B. 73, which held a proprietor immune from civil libel for an accurate republication of a debate in the House of Lords. But the immunity established in *Wason* was not founded in parliamentary privilege, *id.*, at 84, but upon analogy to the privilege for reporting judicial proceedings. *Id.*, at 87-90. The *Wason* court stated its "unhesitating and unqualified adhesion" to the "masterly judgments" rendered in *Stockdale* and characterized the question before it as whether republication, quite apart from any assertion of parliamentary privilege, was "in itself privileged and lawful." *Id.*, at 86-87. That the privileges for nonmalicious republication of parliamentary and judicial proceedings—later established as qualified—were construed as coextensive in all respects, *id.*,

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This was accepted in *Kilbourn v. Thompson* as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." 103 U. S., at 202.

Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," *United States v. Johnson*, 383 U. S., at 180, and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U. S., at 204; *United States v. Johnson*, 383 U. S., at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, *Kilbourn v. Thompson*, 103 U. S., at 204; *Tenney v. Brandhove*, 341 U. S. 367, 377–378 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." *Id.*, at 376.¹⁵

at 95, further underscores the inappropriateness of reading *Wason* as based upon parliamentary privilege, which like the Speech or Debate Clause is absolute. Much later Holdsworth was to comment that at the time of *Wason* the distinction between absolute and qualified privilege had not been worked out and that the "part played by malice in the tort and crime of defamation" probably helped retard recognition of a qualified privilege. 8 Holdsworth's *History of English Law* 377 (1926).

¹⁵ The Court in *Tenney*, 341 U. S., at 376–377, was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White*,

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But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* decided at least this much. “No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.” 383 U. S., at 172. Cf. *Burton v. United States*, 202 U. S. 344, 367–368 (1906).

Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but “only when necessary to prevent indirect impairment of such deliberations.” *United States v. Doe*, 455 F. 2d 753, 760 (CA1 1972).

2 Ld. Raym. 938, 3 *id.*, 20. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn v. Thompson*, 103 U. S. 168; *Marshall v. Gordon*, 243 U. S. 521; compare *McGrain v. Daugherty*, 273 U. S. 135, 176.”

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Here private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House; nor does questioning as to private publication threaten the integrity or independence of the House by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication.¹⁶ We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers was a crime under an Act of Congress, it was not entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was

¹⁶ The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address issues which may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports or other materials. Of course, Art. I, § 5, cl. 3, requires that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy" This Clause has not been the subject of extensive judicial examination. See *Field v. Clark*, 143 U. S. 649, 670-671 (1892); *United States v. Ballin*, 144 U. S. 1, 4 (1892).

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pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction, so long as legislative acts of the Senator are not impugned.

III

Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, cf. *Barr v. Matteo*, 360 U. S. 564 (1959), was considered advisable "to the extent that a congressman has responsibility to inform his constituents" 455 F. 2d, at 760. But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were neither immune from liability nor from testifying about the republication matter and we perceive no basis for conferring a testimonial privilege on Rodberg as the Court of Appeals seemed to do.

IV

We must finally consider, in the light of the foregoing, whether the protective order entered by the Court

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of Appeals is an appropriate regulation of the pending grand jury proceedings.

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.¹⁷

¹⁷ The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

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Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee;¹⁸ (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

¹⁸ Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

71-1017 v.

United States.

United States, Petitioner,
71-1026 v.

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speech and Debate Clause¹ to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read

¹ The Speech and Debate Clause included in Art. I, § 6, Cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

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to it a summary of the so-called Pentagon Papers. He then introduced "the entire papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit." — F. 2d —. Thereafter, he supplied a copy of the papers to the Beacon Press, a Boston publishing house, on the understanding that it would publish the papers without profit to the Senator. A grand jury was investigating the release of the Pentagon Papers and subpoenaed one Rodberg, an aide to Senator Gravel, to testify. Rodberg moved to quash the subpoena; and on the same day the Senator moved to intervene. Intervention was granted and in due course the Court of Appeals entered the following order which is now before us for review:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions, in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention, while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

I

Both the introduction of the Pentagon Papers by Senator Gravel into the record before his Subcommittee

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and his efforts to publish them were clearly covered by the Speech and Debate Clause, as construed in *Kilbourn v. Thompson*, 103 U. S. 168, 204:

“It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.”²

One of the things normally done by a member “in relation to the business before it” is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus v. Wyman*, 360 U. S. 72; *Kilbourn v. Thompson*, *supra*, at 190.

In all other situations, however, the judiciary’s view of the motives or germaneness of a Senator’s conduct

² And see *United States v. Johnson*, 383 U. S. 169, 172, 177; and *Tenney v. Brandhove*, 341 U. S. 367, 376.

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before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney v. Brandhove*, 341 U. S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech and Debate Clause philosophy as mailing under a frank a Senator or a Congressman's speech across the Nation. As mentioned earlier, "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function." W. Wilson, *Congressional Government* 303 (1885), quoted with approval in *Tenney v. Brandhove*, 341 U. S. 367, 377 n. 6. "From the earliest times in its history, the Congress has assiduously performed an 'informing function,'" *Watkins v. United States*, 354 U. S. 178, 200 n. 33. "Legislators have an obligation to take positions in controversial political questions so that their constituents can be fully informed by them." *Bond v. Floyd*, 385 U. S. 116, 136.

We said in *United States v. Johnson*, 383 U. S. 169, 179, that the Speech and Debate Clause established a "legislative privilege" that protected a member of Congress against prosecution "by an unfriendly executive and conviction by a hostile judiciary" in order, as Mr. Justice Harlan put it, to ensure "the independence of the legislature." That hostility emanates from every stage of the present proceedings. It emphasizes the need to construe the Speech and Debate Clause generously, not niggardly. If republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced

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at a hearing before Congress must also do so. That means that republication by Beacon Press is within the ambit of the Speech and Debate Clause and that the confidences of the Senator in arranging it are not subject to inquiry "in any other place" than the Congress.

It is said that though the Senator is immune from questioning as to what he said and did in preparation for the committee hearing and in conducting it, his aides may be questioned in his stead. Such easy circumvention of the Speech and Debate Clause would indeed make it a mockery. The aides and agents such as Beacon Press must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech and Debate Clause embrace.

II

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning.³ Most discussions have

³ See Note, Developments In The Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1207–1215 (1972); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885, 885–887 (1971); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U. C. L. A. L. Rev. 1044 (1965); Schwartz, Executive Privilege and Congressional Investigatory Power, 47 Calif. L. Rev. 3 (1959); Executive Privilege: The Withholding of Information by the Executive, Hearings on S. 1125 before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). There is no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemptions from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552 (b) and the espionage laws, 18 U. S. C. §§ 792–799. Rather, the classification regime has been implemented through a series of executive orders described in Note, Developments In The Law, *supra*, at 1192–1198. It has also been claimed that several sections of Art. II (such as the

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centered on the scope of the Executive privilege in stamping documents as "secret," "top secret," "confidential" and so on, thus withholding them from the eyes of Congress and the press. The practice has reached large proportions, it being estimated ⁴ that

(1) Over 30,000 people in the Executive Branch have the power to wield the classification stamp.

(2) The Department of State, the Department of Defense, and the Atomic Energy Commission have over 20 million classified documents in their files.

(3) Congress appropriates approximately \$15 billion annually without most of its members or the public or the press knowing for what purposes the money is to be used.⁵

designation of the President as Commander-in-Chief of the Army and Navy) confer upon the Executive an inherent power to classify documents. See Report of the Commission on Government Security, S. Doc. No. 64, 85th Cong., 1st Sess., 158 (1957).

⁴ Executive Privilege: The Withholding of Information by the Executive, Hearing on S. 1125, Subcommittee on Separation of Powers, S. Judiciary Committee, 92d Cong., 1st Sess., 517-518 (1971). One estimate of the number of officials who can classify documents is even higher. In the Department of Defense alone, 803 persons have the authority to classify documents Top Secret; 7,687 have permission to stamp them Secret, and 31,048 have the authorization to denominate papers Confidential. United States Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 2, at 599 (statement of David Cooke, Deputy Assistant Secretary of Defense).

⁵ Senator Fulbright, chairman of the Senate Foreign Relations Committee, recently testified that his committee had been so unsuccessful in obtaining accurate information about the Vietnam war from the Executive Branch that it was required to hire its own investigators and send them to Southeast Asia. Executive Privilege: The Withholding of Information By The Executive, Hearings before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary 206 (1971).

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The problem looms large as one of separation of powers. Woodrow Wilson wrote about it in terms of the "informing function" of Congress.⁶

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public opinion."

That is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document

⁶ W. Wilson, *Congressional Government*, 303-304 (1885).

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is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an *ombudsman*, refereeing the disputes between the other two branches. The federal courts do become vitally involved whenever their power is sought to be invoked either to protect the press against censorship as in *New York Times Co. v. United States*, 403 U. S. 713, or to protect the press against punishment for publishing "secret" documents or to protect an individual against his disclosure of their contents for any of the purposes of the First Amendment.

Forcing the press to become the Government's co-conspirator in maintaining state secrets is at war with the objectives of the First Amendment. That guarantee was designed in part to ensure a meaningful version of self-government by immersing the people in a "steady, robust, unimpeded and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Caldwell v. United States*, ante, —, —; *Brandenburg v. Ohio*, 395 U. S. 444; *Stanley v. Georgia*, 394 U. S. 557, 564; *Lamont v. Postmaster*, 381 U. S. 301, 308; *N. Y. Times Co. v. Sullivan*, 376 U. S. 254, 270. As I have said elsewhere, *e. g.*, *Caldwell*, supra; *Kleindienst v. Mandel*, ante, —, —, that Amendment is aimed at protecting not only speakers and writers but also listeners and readers. The essence of our form of governing was at the heart of Justice Black's reminder in the Pentagon Papers case that "[t]he press was protected so that it could lay bare the secrets of Government and inform the people." 403 U. S., at 717. Similarly, Senator Sam Ervin has observed: "When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using de-

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vices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion."⁷ Ramsey Clark as Attorney General expressed a similar sentiment: "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy."⁸ And see Meiklejohn, *The First Amendment is Absolute*, 1961 Sup. Ct. Rev. 254; Press Freedoms Under Pressure: Report of the Twentieth Century Fund Task Force on the Government and the Press 109-117 (1972) (Background Paper by Fred Graham on "Access to News"); M. Johnson, *The Government Secrecy Controversy* 39-41 (1967).

Jefferson in a letter to Madison dated December 20, 1787, asked "whether peace is best preserved by giving energy to the government, or information to the people." And he answered, "This last is the most certain, and the most legitimate engine of government." 6 Writings of Thos. Jefferson 392 (Memorial ed. 1903).

Madison at the time of the Whiskey Rebellion spoke in the House against a resolution of censure against the groups stirring up the turmoil against that rebellion.

"If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Brant, *The Madison Heritage*, 35 N. Y. U. L. Rev. 882, 900.

Yet, as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the

⁷ Ervin, *Secrecy in a Free Society*, 213 *The Nation* 454, 456 (1971).

⁸ Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 Ad. L. Rev. 263, 264 (1967).

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Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99½%" of the cases would present no danger to national security.⁹ To refuse to publish "classified" reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or "leaks" it would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government.¹⁰ By that test Beacon Press could with

⁹ Hearing before Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations 97 (1971); Cong. Horton, *The Public's Right to Know*, 77 Case & Comm. 3, 5 (1972). We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both communist and United States forces. Even a training manual devoted to the history of the Bolshevik revolution was dubbed secret by the military. Hearings, *supra*, at 966, 967 (testimony of former classification officer). And, ordinary newspaper clippings of criticism aimed at the military have been routinely marked secret. Hearings, *supra*, at 100. Former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10% genuinely required restricted access for any significant period of time." United States Government Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. I, at 12 (1971).

¹⁰ Moreover, I would not even permit a conviction for the publication of documents related to future and sensitive planning where the jury was permitted, as it was in *United States v. Drummond*, 354 F. 2d 132, 152 (CA2), to consider the fact that the documents had been

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impunity reproduce the Pentagon Papers inasmuch as their content "is all history, not future events. None of it is more recent than 1968." *New York Times Co. v. United States*, 403 U. S. 713, 722, n. 3.

The late Justice Harlan in the Pentagon Papers case said that in that situation the courts had only two restricted functions to perform: *first*, to ascertain whether the subject matter of the dispute lies within the proper compass of the President's constitutional power; and *second* to insist that the head of the Executive Department concerned—whether State or Defense—determine if disclosure of the subject matter "would irreparably impair the national security." Beyond those two inquiries, he concluded, the judiciary may not go. 403 U. S., at 757-758.

My view is quite different. When the press stands before the court as a suspected criminal, it is the duty of the court to disregard what the prosecution claims is the executive privilege and to acquit the press or overturn the ruling or judgment against it, if the First Amendment and the assertion of the executive privilege conflict. For the executive privilege—nowhere made explicit in the Constitution—is necessarily subordinate to the express commands of the Constitution.

United States v. Curtiss-Wright Corp., 299 U. S. 304, involved the question whether a proclamation issued

classified by the Executive Branch pursuant to its present overbroad system which, in my view, unnecessarily sweeps too much nonsensitive information into the locked files of the bureaucracies. In general, however, I agree that there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. As Professor Henkin has observed, many deliberations in Government are kept confidential, such as the proceedings of grand juries or our own Conferences, despite the fact that the breadth of public knowledge is thereby diminished. Henkin, *The Right To Know And The Duty To Withhold: The Case Of The Pentagon Papers*, 120 U. Pa. L. Rev. 271, 274-275 (1971).

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by the President, pursuant to a Joint Resolution of the Congress, was adequate to sustain an indictment. The Court, in holding that it did, discussed at length the power of the President. The Court said that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." *Id.*, at 320.

When the executive launches a criminal prosecution against the press, it must do so only under an Act of Congress. Yet Congress has no authority to place the press under the restraints of the executive privilege without "abridging" the press within the meaning of the First Amendment.

In related and analogous situations, federal courts have subordinated the executive privilege to the requirements of a fair trial.

Chief Justice Marshall in the trial of Aaron Burr ruled "That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession is not controverted." *United States v. Burr*, 25 Fed. Cas. 187, 191. Yet he "may have sufficient motives for declining to produce a particular paper and these motives may be such as to restrain the Court from enforcing its production." *Ibid.* A letter to the President, he said, "may relate to public concerns" and not "forced into public view." *Id.*, at 192. But where the paper was shown "to be essential to the justice of the case," *ibid.*, "the paper should be produced or the cause be continued." *Ibid.*

Jencks v. United States, 353 U. S. 657, is in that tradition. It was a criminal prosecution for perjury, the telling evidence against the accused being the testimony of Government investigators. The defense asked for contemporary notes made by agents at the time. Refusal

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was based on their confidential character. We held that to be reversible error.¹¹

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States*, 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Id.*, at 672.

Congress enacted the so-called Jencks Act, 18 U. S. C. § 3500, regulating the use of government documents in criminal prosecutions. We sustained that Act. *Scales v. United States*, 367 U. S. 203, 258. Under the Act a defendant "on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in pos-

¹¹ In *Alderman v. United States*, 394 U. S. 165, we took a like course is requiring the prosecution to disclose to the defense records of unlawful electronic surveillance:

"It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant." *Id.*, at 184.

A different rule obtains in civil suits where the government is not the moving party but is a defendant and has specified the terms on which it may be sued. *United States v. Reynolds*, 345 U. S. 1, 12.

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session of the Government touching the events or activities as to which the witness has testified at the trial The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell v. United States*, 365 U. S. 85, 92. And see *Clancy v. United States*, 365 U. S. 312.

The prosecution often dislikes to make public the identity of the informer on whose information its case rests. But his identity must be disclosed where his testimony is material to the trial. *Roviaro v. United States*, 353 U. S. 53. In other words, the desire for Government secrecy does not override the demands for a fair trial. And see *Scher v. United States*, 305 U. S. 251, 254. The constitutional demands for a fair trial, implicit in the concept of due process, *In re Murchison*, 349 U. S. 133, 136, override the Government's desire for secrecy, whether the identity of an informer or the executive privilege be involved. And see *Smith v. Illinois*, 390 U. S. 129.

The requirements of the First Amendment are not of lesser magnitude. They override any claim to executive privilege. As stated in *United States v. Curtiss-Wright Corp.*, *supra*, the class of executive privilege "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." 299 U. S., at 320.

III

Aside from the question of the extent to which publishers can be penalized for printing classified documents, surely the First Amendment protects against all inquiry into the dissemination of information which, although once classified, has become part of the public domain.

To summon Beacon Press through its officials before the grand jury and to inquire into why it did what it did and its publication plans is "abridging" the freedom

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of the press contrary to the command of the First Amendment. In light of the fact that these documents were part of the official Senate record,¹² Beacon Press has violated no valid law, and the grand jury's scrutiny of it reduces to "[e]xposure purely for the sake of exposure." *Uphaus v. Wyman*, *supra*, at 82 (dissenting opinion). As in *United States v. Rumely*, 345 U. S. 41, where a legislative committee inquired of a publisher of political tracts as to its customers' identities, "[i]f the present inquiry were sanctioned, the press would be subject to harassment that in practical effect might be as serious as censorship." *Id.*, 57 (concurring opinion). Under our Constitution the Government has no surveillance over the press. That includes, as we held in *New York Times Co. v. United States*, 403 U. S. 713, the prohibition against prior restraints. Yet criminal punishment for or investigations of what the press publishes, though a different species of abridgment, is nonetheless within the ban of the First Amendment.

The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

¹² Republication of what has filled the Congressional Record is commonplace. Newspapers, television, and radio use its contents constantly. I see no difference between republication of a paragraph and republication of material amounting to a book. Once a document or a series of documents is in the record of the Senate or House or one of its committees it is in the public domain.

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What would be permissible if Beacon Press "stole" the Pentagon Papers is irrelevant to today's decision. What Beacon Press plans to publish is matter introduced into a public record by a Senator acting under the full protection of the Speech and Debate Clause.¹³ In light of the command of the First Amendment we have no choice but to rule that here government, not the press, is lawless.

I would affirm the judgment of the Court of Appeals except as to Beacon Press in which case I would reverse.

¹³ It is conceded that all of the material which Beacon Press has undertaken to publish was introduced into the Subcommittee record and that this record is open to the public. See Government's Brief, at 3.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

71-1017 v.

United States.

United States, Petitioner,

71-1026 v.

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, join, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech or Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

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I

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is a far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the publication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House." *Ante*, at 19. Therefore, "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Ibid*.

Thus the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before

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it," *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins v. United States*, 354 U. S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in the agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.*, at 200, n. 33.

We need look no further than Congress itself to find evidence supporting the Court's observation in *Watkins*. Congress has provided financial support for communications between its members and the public, including the franking privilege for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the Congressional Record. Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern. The list is virtually endless, but a small sampling of contemporaneous hearings of this kind would certainly include the Kefauver hearings on organized crime, the 1966 hearings on automobile safety, and the numerous hearings of the Senate Foreign Relations Committee on the origins and conduct of the war in Vietnam. In short, there can be little doubt that informing the electorate is a thing "generally done" by the members of Congress "in relation to the business before it."

The informing function has been cited by numerous students of American politics, both within and without the Government, as among the most important responsibilities of legislative office. Woodrow Wilson, for example, emphasized its role in preserving the separation of powers by ensuring that the administration of public

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policy by the Executive is understood by the legislature and electorate:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." W. Wilson, *Congressional Government* 303 (1885).

Others have viewed the give-and-take of such communication as an important means of educating both the legislator and his constituents:

"With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications, actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." *The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Association* 14 (1945).

Though I fully share these and related views on the

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educational values served by the informing function, there is yet another and perhaps more fundamental interest at stake. It requires no citation of authority to state that public concern over current issues—the War, race relations, governmental invasions of privacy—has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an “ordinary” task of the legislator but one that is essential to the continued vitality of our democratic institutions.

Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged; intervention before Executive departments is one that is not. But the informing function carries a far more persuasive claim to the protections of the Clause. It has been recognized by this Court as something “generally done” by Congressmen, the Congress itself has established special concessions designed to lower the cost of such communication, and, most important, the function furthers several well-recognized goals of representative government. To say in the face of these facts that the informing function is not privileged merely because it is not necessary to the internal deliberations of Congress is to give the Speech or Debate Clause an artificial and narrow reading unsupported by reason.

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Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. Thomas Jefferson clearly expressed that view of legislative privilege in a case involving Samuel Cabell, Congressman from Virginia. In 1797 a federal grand jury in Virginia investigated the conduct of several Congressmen, including Cabell, in sending newsletters to constituents critical of the administration's policy in the war with France. The grand jury found that the Congressmen had endeavored "at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States." Jefferson immediately drafted a long essay signed by himself and several citizens of Cabell's district, condemning the grand jury investigation as a blatant violation of the congressional privilege. Revised and joined by James Madison, the protest was forwarded to the Virginia House of Delegates. It reads in part as follows:

"... that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should be of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence

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between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

“That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the coordinate branches, Executive and Judiciary; and for its safe and convenient exercise, the intercommunication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.

“That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, ex-

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pense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . ; and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods." 8 *The Works of Thomas Jefferson* 322-327 (Ford ed. 1904).

Jefferson's protest is perhaps the most significant and certainly the most cogent analysis of the privileged nature of communication between Congressman and public. Its comments on the history, purpose and scope of the Clause leave no room for the notion that the Executive or Judiciary can in any way question the contents of that dialogue. Nor was Jefferson alone

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among the Framers in that view. Aside from Madison, who joined in the protest, James Wilson took the position that a member of Congress "should enjoy the fullest liberty of speech, and . . . should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence." *I Works of James Wilson* 421 (McCloskey ed. 1967). Wilson, a member of the Committee responsible for drafting the Speech or Debate Clause, stated in plainest terms his belief in the duty of Congressmen to inform the people about proceedings in the Congress:

"That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.*, at 422.

Wilson's statements, like those of Jefferson and Madison, reflect a deep conviction of the Framers, that self-government can succeed only when the people are informed by their representatives, without interference by the Executive or Judiciary, concerning the conduct of their agents in government. That conviction is no less valid today than it was at the time of our founding. I would honor the clear intent of the Framers and extend to the informing function the protections embodied in the Speech or Debate Clause.

The Court, however, offers not a shred of evidence concerning the Framers' intent, but relies instead on the English view of legislative privilege to support its inter-

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pretation of the Clause. Like the Court itself, *ante*, at n. 14, I have some doubt concerning the relevance of English authority to this case, particularly authority post-dating the adoption of our Constitution. But in any event it is plain that the Court has misread the history on which it relies. The Speech or Debate Clause of the English Bill of Rights was at least in part the product of a struggle between Parliament and Crown over the very type of activity involved in this case. During the reign of Charles II, the House of Commons received a number of reports about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. The most famous of these reports, Dangerfield's Narrative, was entered into the Commons Journal and then republished by order of the Speaker of the House, Sir William Williams, with the consent of Commons. In 1686, after James II came to the throne, informations charging libel were filed against Williams in King's Bench. Despite the arguments of his attorney, Sir Robert Atkyns, that the publication was necessary to the "counselling" and "enquiring" functions of Parliament, Williams' plea of privilege was rejected and he was fined £10,000. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." 9 Grey's Debates 37. In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one, . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament." *Id.*, at 81. Following consultation with the House of Lords, that provision was included as part of the English Bill of Rights, and the judgment against Williams was declared by Commons "illegal and sub-

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versive of the freedom of parliament." I Townsend, *Memoirs of the House of Commons* 414 (2d ed. 1844).

Although the origins of the Speech or Debate Clause in England can thus be traced to a case involving republication, the Court, citing *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839), says that "English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House." *Ante*, at 16. That conclusion reflects an erroneous reading of precedent. *Stockdale* did state that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher." *Id.*, at 114, 112 K. B., at 1156. But *Stockdale* concerned only the publisher's liability, not that of a member of Parliament; thus it has little bearing on the instant case. Furthermore, contrary to the Court's assertion, *ante*, at n. 14, even the narrow result of *Stockdale* was repudiated 30 years later in *Wason v. Walter*, [1868] 4 Q. B. 73, for reasons strikingly similar to those expressed by Jefferson in his protest.¹ In my view,

¹ In *Wason* the proprietor of the London Times was sued for printing an account of a libellous debate in the House of Lords. The Court agreed with *Stockdale* that the House did not have final authority to determine the scope of its privileges and thus could not confer immunity on any publisher merely by ordering a document printed and then declaring it privileged. Indeed the *Wason* Court gave its "unhesitating and unqualified adhesion" to *Stockdale* on that point. *Id.*, at 86. The only issue for the Court, therefore, was whether the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.*, at 87. On that issue the Court severely criticized the reasoning of earlier cases, including *Stockdale*, stating that two of the Justices in that case had expressed a "very shortsighted view of the subject." *Id.*, at 91. The Court held that so long as the republication was accurate and in good faith, it could not be the basis of a libel action; and the member himself was privileged to publish his speech "for the information of his constituents." *Id.*, at 95. Relying not on the Parliamentary Papers Act of 1840, which was enacted in response to *Stockdale*, but on the analogy to

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therefore, the English precedent, if relevant at all, supports Senator Gravel's position here.

Thus, from the standpoint of function or history, it is plain that Senator Gravel's dissemination of material,

judicial reports and the need for an informed public, the Court stated:

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?" *Id.*, at 89.

The fact that the debate was published in violation of a standing order of Parliament was held to be irrelevant. "Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings . . . [A]ny publication of its debates made in contravention of its orders would be a matter between the house and the publisher." *Id.*, at 95.

Whether *Wason* was based on parliamentary privilege or on an analogy to the publication of judicial proceedings is unimportant. What is important to the instant case is that *Wason* firmly rejected any implication in *Stockdale* that the informing function was not among the legislative activities that a member of Parliament was privileged to perform. Indeed that same conclusion was reached by Sir Gilbert Campion, a noted scholar, in his memorandum to the

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placed by him in the record of a congressional hearing, is itself legislative activity protected by the privilege of speech or debate. Whether or not that privilege protects the publisher from prosecution or the Senator from senatorial discipline, it certainly shields the Senator from any grand jury inquiry about his part in the publication. As we held in *United States v. Johnson*, 383 U. S. 169 (1966), neither a Congressman, nor his aides, nor third parties may be made to testify concerning privileged acts or their motives. That immunity, which protects legislators "from deterrents to the uninhibited discharge of their legislative duty," *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951), is the essence of the Clause, designed not for the legislators' "private indulgence but for the public good." *Id.*, at 377.

That privilege, moreover, may not be defeated merely because a court finds that the publication was irregular or the material irrelevant to legislative business. Legislative immunity secures "to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office . . . whether the exercise was regular, according

House of Commons' Select Committee on the Official Secrets Acts. After reviewing the republication cases through *Wason*, the memorandum concluded:

"If . . . a member circulated among his constituents a speech made by him in Parliament in which he had disclosed information [otherwise subject to the Official Secrets Acts], it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in a secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House was protected by parliamentary privilege, the circulation of the speech among the member's constituents was not." Minutes of Evidence Taken before the Select Committee on the Official Secrets Acts 29 (1939).

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to the rules of the house, or irregular and against their rules." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). Thus, if the republication of this committee record was unauthorized or even prohibited by the Senate rules, it is up to the Senate, not the Executive or Judiciary, to fashion the appropriate sanction to discipline Senator Gravel.

Similarly, the Government cannot strip Senator Gravel of the immunity by asserting that his conduct "did not relate to any pending Congressional business." Brief, at 41. The Senator has stated that his hearing on the Pentagon Papers had a direct bearing on the work of his Subcommittee on Buildings and Grounds, because of the effect of the Vietnam war on the domestic economy and the lack of sufficient federal funds to provide adequate public facilities. If in fact the Senator is wrong in this contention, and his conduct at the hearing exceeded the subcommittee's jurisdiction, then again it is the Senate that must call him to task. This Court has permitted congressional witnesses to defend their refusal to answer questions on the ground of nongermaneness. *Watkins v. United States*, 354 U. S. 178 (1957). Here, however, it is the Executive that seeks the aid of the judiciary, not to protect individual rights, but to extend its power of inquiry and interrogation into the privileged domain of the legislature. In my view the Court should refuse to turn the freedom of speech or debate on the Government's notions of legislative propriety and relevance. We would weaken the very structure of our constitutional system by becoming a partner in this assault on the separation of powers.

Whether the Speech or Debate Clause extends to the informing function is an issue whose importance goes beyond the fate of a single Senator or Congressman. What is at stake is the right of an elected representative to inform, and the public to be informed, about

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matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive.² The threat of "prosecution by an unfriendly executive and conviction by a hostile judiciary," *United States v. Johnson*, 383 U. S., at 179, which the Clause was designed to avoid, can only lead to timidity in the performance of this vital function. The Nation as a whole benefits from the congressional investigation and exposure of official corruption and deceit. It likewise suffers when that exposure is replaced by muted criticism, carefully hushed behind congressional walls.

II

Equally troubling in today's decision is the Court's refusal to bar grand jury inquiry into the source of documents received by the Senator and placed by him in the hearing record. The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act. In *United States v. Johnson*, 383 U. S., 169 (1966), the Court acknowl-

² Different considerations may apply, of course, where the republication is attacked, not by the Executive, but by private persons seeking judicial redress for an alleged invasion of their constitutional rights.

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edged the privileged nature of such preparatory steps, holding that they, like the act itself and its motives, must be shielded from scrutiny by the Executive and Judiciary. That holding merely recognized the obvious—that speeches, hearings, and the casting of votes require study and planning in advance. It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat. The reasoning that guided that Court in *Johnson* is no less persuasive today, and I see no basis, nor does the Court offer any, for departing from it here. I would hold that Senator Gravel's receipt of the Pentagon Papers, including the name of the person from whom he received it, may not be the subject of inquiry by the grand jury.

I would go further, however, and also exclude from grand jury inquiry any knowledge that the Senator or his aides might have concerning how the source himself first came to possess the Papers. This immunity, it seems to me, is essential to the performance of the informing function. Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds. That evidence must be ferreted out, and often is, by fellow employees and subordinates. Their willingness to reveal that information and spark congressional inquiry may well depend on assurances from their contact in Congress that their identity and means of obtaining the evidence will be held in strictest confidence. To permit the grand jury to frustrate that expectation through an inquiry of the Congressman and his aides can only dampen the flow of information to the Congress and thus to the American people. There is a similar risk, of course, when the member's own House requires him to break the confidence. But the danger, it seems to me, is far

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less if the members' colleagues, and not an "unfriendly executive" or "hostile judiciary," are charged with evaluating the propriety of his conduct. In any event, assuming that a Congressman can be required to reveal the sources of his information and the methods used to obtain that information, that power of inquiry, as required by the Clause, is that of the Congressman's House, and of that House only.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

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On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman from being forced to testify before a grand jury about sources of information used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of so vitally important a constitutional issue.

In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life. And informants such as these may be willing to relate information to a Congressman only in confidence, fearing that disclosure of their identities might cause loss of their jobs or harassment by their colleagues or employers. In fact, I should sup-

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pose it to be self-evident that many such informants would insist upon an assurance of confidentiality before revealing their information. Thus, the acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.

The Court of Appeals for the First Circuit recognized the importance of the information gathering process in the performance of the legislative function. It held that the Speech or Debate Clause bars all grand jury questioning of a member of Congress regarding the sources of his information. The Court of Appeals reasoned that to allow a "grand jury to question a Senator about his sources would chill both the vigor with which legislators seek facts and the willingness of potential sources to supply them." *United States v. Doe*, 445 F. 2d 753, 758-759. The government *did not seek review of this ruling*, but rather sought certiorari on the question whether the Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives.¹

The Court, however, today decides, *sua sponte*, that a member of Congress may, despite the Speech or Debate

¹ As stated in its petition for certiorari, the Government asked us to consider

"Whether Article 1, Section 6, of the Constitution providing that . . . 'for any Speech or Debate in either House, the Senators and Representatives' . . . 'shall not be questioned in any other Place' bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected Speech or Debate."

The Government also asked us to consider

"Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his Senator-employer had introduced into the record of a Senate subcommittee."

We granted certiorari on both questions. 405 U. S. 916.

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Clause, be compelled to testify before a grand jury concerning the sources of information used by him in the performance of his legislative duties, if such an inquiry “*proves relevant to investigating possible third party crime.*” *Ante*, at 22 (emphasis supplied).² In my view, this ruling is highly dubious in view of the basic purpose of the Speech or Debate Clause—“to prevent intimidation [of Congressmen] by the executive and accountability before a possibly hostile judiciary.” *United States v. Johnson*, 383 U. S. 169, 181.

Under the Court’s ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur, because the judiciary has traditionally imposed virtually no limitations on the grand jury’s broad investigatory powers; grand jury investigations are not limited in scope to specific criminal acts, and standards of materiality and relevance are greatly relaxed.³ But even if the Executive had reason to believe that a member of Congress had knowledge of a specific probable violation of law, it is by no means clear to me that the Executive’s interest in the administration of justice must *always* override the public interest in having an informed Congress. Why should we not, given the tension between two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases? And why are not the Houses of Congress the proper institutions in most situations to impose sanctions upon a Representative or Senator who withholds infor-

² See also, *ante*, 15, 21.

³ See, *e. g.*, *Wilson v. United States*, 221 U. S. 361; *Hendricks v. United States*, 223 U. S. 178, *United States v. Johnson*, 319 U. S. 503. See generally, *Holt v. United States*, 218 U. S. 245; *United States v. Costello*, 350 U. S. 359.

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mation about crime acquired in the course of his legislative duties?⁴

I am not prepared to accept the Court's rigid conclusion that the Executive may always compel a legislator to testify before a grand jury about sources of information used in preparing for legislative acts. For that reason, I dissent from that part of the Court's opinion that so inflexibly and summarily decides this vital question.

⁴ During oral argument, the Solicitor General virtually conceded, in the course of arguing that aides should not enjoy the same testimonial privilege as Congressmen, that a Senator could *not* be called before the grand jury to testify about the sources of his information:

"Q. Mr. Solicitor, am I correct that you wouldn't be able to question the Senator as to where he got the papers from?

"A. Oh, Mr. Justice, we are not able to question the Senator about anything insofar as it relates to speech or debate.

"Q. Well, this was related, you agree, to speech and debate?

"A. I am not contending to the contrary. . . ."

The following exchange also took place:

"Q. You can't ask a Senator where you got the material you used in your speech.

"A. Yes, Mr. Justice.

"Q. You can't.

"A. Yes."

At another point in the oral argument, the Solicitor General said that even when a Senator or Representative has knowledge of crime as a result of legislative acts "[t]hey can't be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives."

CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS

HEARINGS
BEFORE THE
JOINT COMMITTEE ON
CONGRESSIONAL OPERATIONS
CONGRESS OF THE UNITED STATES
NINETY-THIRD CONGRESS
FIRST SESSION
ON
THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND
DISCLOSING INFORMATION

THURSDAY, JULY 19, 1973

PART II
Roundtable Discussion

Printed for the use of the
Joint Committee on Congressional Operations



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CONGRESS OF THE UNITED STATES

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Mary C. Lawton, Esq., Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice	
Prof. Philip B. Kurland, University of Chicago Law School, Chi- cago, Ill.	
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(III)

THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS

THURSDAY, JULY 19, 1973

U.S. CONGRESS,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C.

The Joint Committee met, pursuant to notice, at 10 a.m., in room S-407, the Capitol, Hon. Lee Metcalf (chairman) presiding.

Present: Senator Metcalf, Senator Helms, Congressman Brooks (vice chairman), Congressman Cleveland and Congressman Giaimo.

ROUNDTABLE DISCUSSION

Participants

PROF. ALEXANDER M. BICKEL, YALE LAW SCHOOL, NEW HAVEN, CONN.

MARY C. LAWTON, ESQ., DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

PROF. PHILIP B. KURLAND, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILL.

MICHAEL VALDER, ESQ., COUNSEL FOR PLAINTIFFS-PETITIONERS, DOE V. McMILLAN, NO. 71-6356 (U.S. SUPREME COURT)

Representative Brooks [presiding]. The Joint Committee on Congressional Operations is convened.

We meet this morning with a distinguished panel of witness-experts to conclude our inquiry into the constitutional immunity of Members of Congress with this roundtable discussion of issues raised by recent Supreme Court interpretations of the well-known Speech or Debate Clause of the Constitution.

Participating in this roundtable with the joint committee will be Ms. Mary Lawton, Prof. Philip Kurland, Mr. Mike Valder, and Prof. Alexander Bickel.

I regret that our very distinguished and able fellow Members, Congressman Sidney Yates and Congresswoman Edith Green, who had stopped by to hear a part of this discussion have had to leave. I want the record to show they were here and that they share our interest in this matter.

Ms. Mary Lawton is Deputy Assistant Attorney General in the Office of Legal Counsel at the Justice Department. She brings to this discussion valuable experience gained in the Justice Department, where she has been since her graduation from Georgetown Law Center.

Prof. Philip Kurland of the University of Chicago Law School is a well-known and respected constitutional lawyer. He serves as a consultant to Senator Ervin's Separation of Powers Judiciary Subcommittee and was a draftsman of the brief filed in the Supreme Court on behalf of the Senate in the *Gravel* case.

Mike Valder was until June of this year associated with the Urban Law Institute of Antioch College and served as a professor at the Antioch Law Center. Mr. Valder was counsel for petitioners in the case of *Doe v. McMillan*, handed down by the Supreme Court on May 29, in which he argued for accountability of congressional defendants for material included in a report of a congressional committee.

To introduce our fourth panelist, I yield to Congressman Giaimo.

Representative GIAIMO. Mr. Chairman, it is a pleasure for me to introduce a gentleman who is very well-known—certainly in the Halls of Congress—and who really doesn't need any introduction. He has a very long and distinguished career at the Yale Law School and is the author of many great articles involving many of the critical concerns of the day. Prof. Alexander Bickel, of the Yale Law School, it is an honor to have you here.

Professor BICKEL. Thank you.

Representative BROOKS. We welcome our panelists.

I might say that the distinguished chairman of this committee, Senator Metcalf, was here earlier this morning and has gone over to the Senate for a 10:15 vote and is expected back shortly. We look forward to his return.

We have agreed to dispense with prepared statements by witnesses.

We would appreciate your candid views and your forthright responses to our questions as we conclude this inquiry into the constitutional immunity of individual legislators.

Before we open our discussion, Senator Taft has called to our attention to an article on "Legislative Privilege and the Separation of Powers," which appeared in the May 1973 edition of the *Harvard Law Review*. Copies of the article have been made available to each member of the committee. If there is no objection—in the absence of Senator Taft—I will include the article as part of the hearing record.

ARTICLE

LEGISLATIVE PRIVILEGE AND
THE SEPARATION OF POWERS

by

ROBERT J. REINSTEIN
HARVEY A. SILVERGLATE

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HARVARD LAW REVIEW

LEGISLATIVE PRIVILEGE AND THE SEPARATION OF POWERS

Robert J. Reinstein * and *Harvey A. Silverglate* **

Professor Reinstein and Mr. Silverglate argue that the scope of the Constitution's speech or debate privilege, article I, section 6, must be defined historically, but not by static criteria derived from the clause's ancient judicial origins. After tracing the dynamic evolution of the privilege as a means of preserving legislative independence, they conclude that the clause's current scope must encompass all legitimate contemporary functions of a legislature in a system embracing a separation of powers. The authors argue that such a functional perspective requires that the privilege be interpreted broadly to prevent intrusions by the executive branch into such legislative activities as the publication of information for congressional colleagues and the public, the acquisition of information for such purposes, and the decisionmaking processes preparatory to such legislative functions, although not into legislative intervention before executive agencies. The functional independence of the legislative branch and the political neutrality of the judicial branch depend upon such a broad definition in executive-motivated suits. But the authors contend that such functional considerations indicate that the clause should be given a narrow scope in private civil suits brought against congressmen or congressional committees, especially those involving constitutional rights. Finally, because recent Supreme Court decisions have not afforded legislators adequate protection, the authors outline several legislative options by which Congress could preserve its independence in the system of separate powers.

* Associate Professor of Law, Temple University; B.S., Cornell, 1965; J.D., Harvard, 1968.

** Member, Massachusetts Bar; A.B., Princeton, 1964; J.D., Harvard, 1967.

The authors were counsel for Senator Gravel in his legislative privilege case, which is discussed extensively in this Article. We cannot overstate the contribution made to this Article by Charles L. Fishman, who was Senator Gravel's chief counsel. Mr. Fishman's ideas pervade this piece and by rights he should be listed as a co-author, but he declined because he did not participate in the actual writing. We of course absolve Mr. Fishman of all responsibility for the final product. The research assistance of Ralph Kates and Gerald McFadden is also gratefully acknowledged.

I. INTRODUCTION

ONLY 7 years ago, writing in *United States v. Johnson*,¹ the fourth case concerning the speech or debate clause² ever to reach the Supreme Court's docket,³ Mr. Justice Harlan observed that "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause."⁴ Yet since then, the Court has taken review of such cases five more times.⁵ Three of these cases were argued last term alone; two — *Gravel v. United States*⁶ and *United States v. Brewster*⁷ resulted in landmark opinions, and one — *Doe v. McMillan*⁸ — is still pending.

Last term's cases present a diverse array of factual situations, in which members of Congress invoked the clause as protection against alleged intrusions into the official actions of congressmen by the executive branch, private citizens, grand juries and the courts. The *Gravel* case is particularly important, since it involved a classic confrontation, nearly unprecedented in 200 years of American constitutional history, between avowedly separate and coequal branches of government. It arose out of the Justice Department's use of a Boston-based grand jury to interrogate Dr.

This Article is dedicated to the memory of our late teacher, Henry M. Hart, Jr.
¹ 383 U.S. 169 (1966).

² The speech or debate clause provides that
 for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place.
 U.S. CONST. art. I, § 6.

³ Prior to 1966, the Court had rendered decisions on the merits in only two cases involving the clause, *Kilbourn v. Thompson*, 103 U.S. 168 (1881) and *Tenney v. Brandhove*, 341 U.S. 367 (1951). The discussion in *Tenney*, although extensive, was technically dictum since the suit was brought against state legislators under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1970), and the Court fashioned a common law privilege similar to the constitutional privilege for congressmen. In a third case, the court of appeals upheld a Senator's assertion of the privilege, and the Supreme Court declined to take review. *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), cert. denied, 282 U.S. 874 (1930). We exclude from this list another case which commentators occasionally refer to as involving the speech or debate clause, *Long v. Ansell*, 293 U.S. 76 (1934), because Senator Long's defense was premised entirely upon the distinct privilege from arrest. See p. 1123 & note 48, p. 1137 & note 128, p. 1139 & note 139 *infra*. In rejecting that defense as a bar against civil service of process, Justice Brandeis' opinion properly avoided mention of the speech or debate privilege.

⁴ *United States v. Johnson*, 383 U.S. 169, 179 (1966).

⁵ *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (1972), noted in *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 189 (1972); *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir.), cert. granted, 408 U.S. 922 (1972).

⁶ 408 U.S. 606 (1972).

⁷ 408 U.S. 501 (1972).

⁸ 459 F.2d 1304 (D.C. Cir.), cert. granted, 408 U.S. 922 (1972).

Leonard Rodberg, an aide to Senator Mike Gravel (D., Alaska), concerning the Senator's conduct at an extraordinary meeting⁹ of the Senate Subcommittee on Public Buildings and Grounds, which Senator Gravel headed. At that meeting, held on June 29, 1971, the Senator read aloud segments of a classified Defense Department study of the history of United States decisionmaking in Vietnam, popularly known as the "Pentagon Papers," and then placed into the record of the subcommittee hearing a large portion of that gargantuan study.¹⁰ Aided by Dr. Rodberg, he then prepared the record for publication and engaged the Beacon Press of Boston to publish the entire manuscript, which Beacon did some months later.¹¹

The Justice Department, utilizing the grand jury to investigate the subcommittee hearing, the preparation for it, and the subsequent release of the Senator Gravel edition of the Pentagon Papers, subpoenaed Dr. Rodberg.¹² Dr. Rodberg resisted, and Senator Gravel intervened with a motion to quash the subpoena. The district court preliminarily restrained enforcement

⁹ The meeting was held at midnight, but notice had been given to the members, and the meeting was apparently conducted according to the letter, although possibly not the spirit, of the Senate rules. See 118 CONG. REC. 4620 (daily ed. March 22, 1972).

¹⁰ Another extraordinary feature of the meeting was that the Supreme Court had *sub judice* the case in which the executive had asked for an injunction against two newspapers to prevent the publication of portions of the "Pentagon Papers." See *New York Times Co. v. United States*, 403 U.S. 713 (1971). The Court's opinion in that case was delivered the next day, June 30.

Senator Gravel did not read, nor place into the record, four volumes of the Pentagon Papers dealing with unsuccessful negotiations to end the war in Vietnam. Reply Brief of Senator Gravel at 13-14 n.7, *Gravel v. United States*, 408 U.S. 606 (1972).

¹¹ THE SENATOR GRAVEL EDITION: THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (1971). At about the same time, the Defense Department had the Government Printing Office publish a limited number of a censored edition at a price of \$50. HOUSE COMM. ON ARMED SERVICES, 92D CONG., 1ST SESS., UNITED STATES-VIETNAM RELATIONS 1945-1967 (Comm. Print 1971). The more comprehensive Beacon edition was made available to the public in sufficient quantity at a price of \$20.

¹² Both Dr. Rodberg and Senator Gravel alleged that the purpose of the subpoena of Rodberg was to investigate the Senator's actions with respect to the Pentagon Papers, rather than the actions of Dr. Daniel Ellsberg and Anthony Russo, who had already been indicted for their alleged conversion and distribution of the Papers. Record at 54, 70, *Gravel v. United States*, 408 U.S. 606 (1972). See *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *United States v. Russo*, Crim. No. 9373 (C.D. Cal., filed Dec. 29, 1972); *United States v. Ellsberg*, Crim. No. 8354 (C.D. Cal., filed June 28, 1972). The Justice Department did not deny this allegation, with which its legal arguments were consistent. The district court therefore accepted the allegation even though it had not required the Justice Department to specify the scope of the proposed inquiry. *United States v. Doe*, 332 F. Supp. 930, 932-34 & 933 n.3 (D. Mass. 1971).

of the subpoena, and ultimately rendered an opinion granting partial relief to the Senator.¹³ Both sides appealed, and relief was altered by the Court of Appeals for the First Circuit in a somewhat abstruse opinion¹⁴ that was clarified shortly thereafter.¹⁵ The Supreme Court granted cross petitions for certiorari¹⁶ and ultimately decided the issues essentially adversely to the Senator.¹⁷

Senator Gravel contended throughout the lengthy and complex proceedings that the speech or debate clause does not permit the executive or the judiciary to question members of Congress and their aides "in any other place" concerning their customary legislative activities, which had been defined by prior precedent to include all things "generally done in a session of the House by one of its members in relation to the business before it."¹⁸ In

¹³ The court held that no witness before the grand jury could be questioned about the actions taken by Senator Gravel and his aides in preparing for and holding the subcommittee meeting, and a protective order was entered to that effect. *United States v. Doe*, 332 F. Supp. 930, 937-38 (D. Mass. 1971). The district court also held that the "republishing" of the subcommittee record was not privileged and thus could be investigated by the grand jury and made the subject of a criminal indictment. *Id.* at 936-37.

Each court in this case used the technical term "republishing" to describe the Beacon edition. Since this was the first and only publication of the subcommittee record—it was published neither in the official Senate Journal nor in the unofficial *Congressional Record*—we use the term "publication" in this Article.

¹⁴ *United States v. Doe*, 455 F.2d 753 (1st Cir. 1972).

¹⁵ Clarification came after a motion for rehearing and clarification. *Id.* at 762. The circuit court issued two protective orders. *United States v. Doe*, No. 71-1331 (1st Cir., Jan. 7, 1972); No. 71-1332 (1st Cir., Jan. 18, 1972). The latter reads as follows:

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

Gravel v. United States, 408 U.S. 606, 612-13 (1972), quoting Protective Order, *United States v. Doe*, No. 71-1332 (1st Cir., Jan. 18, 1972).

¹⁶ *Gravel v. United States and United States v. Gravel*, 405 U.S. 916 (1972). On January 24, 1972, Mr. Justice Brennan had granted a stay of the court of appeals order pending the filing of a petition for certiorari. Brief of Senator Mike Gravel at 2, *Gravel v. United States*, 408 U.S. 606 (1972).

¹⁷ See *Gravel v. United States*, 408 U.S. 606 (1972).

¹⁸ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Senator Gravel's assertion of privilege was supported by the United States Senate, which entered the case as *amicus curiae*. Senators Ervin (D., N.C.) and Saxbe (R., Ohio) argued orally for the Senate before the Supreme Court. This was the first time in recent memory

order to adequately protect legislators, Senator Gravel argued, the speech or debate privilege should not be defined literally: though the clause speaks only of legislators themselves, protection of their functions requires that the privilege extend to staff members who assist them.¹⁹ When a subpoena to two printers followed the Rodberg subpoena,²⁰ Senator Gravel broadened his argument to seek protection for "third parties," that is, parties other than Senators and their immediate staff members and aides who assist a Senator in performing his functions. The Senator contended that to be effective in the case at hand, such protection had to encompass his acquisition of the papers, the preparation for and conduct of the subcommittee meeting, and the subsequent publication of the subcommittee record by Beacon Press.

The *Gravel* case, in short, presented the question of how wide a scope should be given to the definition of "legislative acts" — those activities performed by congressmen which are considered proper legislative functions, and thus entitled to the protection of the speech or debate clause. The answer to that question determines the extent to which the courts have jurisdiction to look into crimes allegedly committed by Senators, their aides, or "third parties" in the course of their activities. Put more in terms of separation of powers, the question is to what extent the speech or debate clause requires Congress alone to discipline its members accused of wayward conduct.²¹

The Supreme Court unanimously agreed that aides of congressmen must be treated as their alter egos for the purpose of the

that the Senate had appeared before the Supreme Court as *amicus curiae*. The Senate Resolution authorizing that participation stated that "a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole . . ." S. Res. 286, 92d Cong., 2d Sess., 118 CONG. REC. 4735 (daily ed. March 23, 1972). As it turned out, the Senate's fears were well founded.

¹⁹ Brief for Senator Gravel at 90-100, 109-126, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁰ The first subpoena was addressed to Howard Webber, Director of M.I.T. Press. As with the Rodberg subpoena, Senator Gravel moved to intervene and quash the subpoena, alleging that the intended questioning would focus on the Senator's unsuccessful negotiations with Webber to publish the subcommittee record. Record at 17, *Gravel v. United States*, 408 U.S. 606 (1972). The Justice Department did not deny the allegation, and the district court allowed intervention and stayed operation of the subpoena pending appeal. *Id.* at 136-38. Four days after the court of appeals' decision, a subpoena was served upon Gobin Stair, Director of Beacon Press, which published the subcommittee record. The district court's stay order covered this subpoena and was continued by the court of appeals pending Supreme Court review. *Amicus Brief of Unitarian Universalist Association* at 2, *Gravel v. United States*, 408 U.S. 606 (1972).

²¹ Congress is granted power to discipline its own members under U.S. CONST. art. I, § 5, cl. 2.

speech or debate clause, and agreed also that the clause should be applied in a subject-matter form: if a legislative activity were privileged, there could be no inquiry about it through the testimony of any witness.²² However, a split Court held that the scope of activities protected by the clause is very narrow and does not include publication of the record or receipt of the material for use in committee.²³

*United States v. Brewster*²⁴ involved the same central question as did *Gravel*, but in a far different factual setting. Former Senator Daniel B. Brewster (D., Md.) was indicted for accepting a bribe in exchange for his "being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation" and for soliciting funds "for and because of official acts performed by him."²⁵ The district court dismissed the indictment because it felt that the speech or debate clause "shields [Brewster] from any prosecution for alleged bribery to perform a legislative act,"²⁶ and the Justice Department had conceded that in order to secure a conviction it would have to introduce evidence concerning Senator Brewster's legislative activities.²⁷ The dismissal, in the district judge's view, was required by the Supreme Court's decision in *United States v. Johnson*²⁸ that the speech or debate clause prohibits extra-legislative inquiry into the motivations behind a congressman's speeches or votes. The Justice Department appealed directly to the Supreme Court,²⁹ which reversed, distinguishing *Johnson* and denying Brewster's plea of privilege.

²² *Gravel v. United States*, 408 U.S. 606, 616-22, 627-29 (1972); *id.* at 647 (Douglas, J., dissenting). *But cf. id.* at 628 n.17.

²³ See pp. 1153-57 *infra* for a discussion of this issue.

²⁴ 408 U.S. 501 (1972).

²⁵ *Id.* at 502-03. The facts of the *Brewster* case are detailed at pp. 1157-63 *infra*.

²⁶ *Id.* at 504. The district court's opinion was delivered orally on a motion to dismiss the indictment and is unreported. Record at 33, *United States v. Brewster*, 408 U.S. 501 (1972). In a colloquy with counsel the district court stated:

[T]his Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't very often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together.

Id. at 30. For a prior decision by the same judge (Hart) involving the speech or debate clause, see *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967), *aff'd*, 395 F.2d 577 (D.C. Cir. 1968), *rev'd in part*, 395 U.S. 486 (1969).

²⁷ Record at 28, *United States v. Brewster*, 408 U.S. 501 (1972).

²⁸ 383 U.S. 169 (1966).

²⁹ The appeal was based on 18 U.S.C. § 3731 (Supp. V, 1970). See *United States v. Brewster*, 408 U.S. 501, 504-07 (1972). A 1971 amendment, which does not apply retroactively, no longer permits bypassing the court of appeals. Act of

*Doe v. McMillan*³⁰ reached the Supreme Court too late to be argued along with *Gravel* and *Brewster*, but certiorari was granted before the opinions in those two cases were rendered. *McMillan* arose out of an investigation by the House Committee on the District of Columbia into the problems of the District of Columbia school system. The committee's report discussed, in negative terms, the opinions and alleged activities of certain named students. When the committee was about to "republish" the report and distribute it publicly, these students sued the committee members, their aides and "third parties," including the Public Printer, to enjoin publication.³¹ The plaintiffs asserted that the threatened publication would be an invasion of their constitutional right to privacy and an ill-disguised bill of attainder.³² Congressman McMillan, represented by the Justice Department, asserted the speech or debate clause as a bar to the court's jurisdiction. The district court dismissed the complaint³³ and the court of appeals affirmed³⁴ without expressing any view on the merits, holding that the speech or debate clause and related common law privileges precluded it from considering the suit against any of the defendants.³⁵

The positions taken by Senators Gravel and Brewster are arguably consistent with the recognition that the plaintiffs in *McMillan* should not be totally denied an opportunity to seek relief. The history of the speech or debate clause reveals that the privilege was not meant to apply broadly to suits brought by citizens to protect their civil rights from invasion by congressmen or congressional committees.³⁶ Rather, it was designed primarily to be invoked by congressmen in order to prevent executive intimidation and harassment.³⁷ However, the Justice Department

Jan. 2, 1971, Pub. L. 91-644, Title III, § 14(a)(1), 84 Stat. 1890, *codified at* 18 U.S.C. § 3731 (Supp. 1972).

³⁰ 459 F.2d 1304 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

³¹ For obvious reasons, the plaintiffs sued anonymously.

³² 459 F.2d 1304, 1308 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

³³ *See id.* at 1308.

³⁴ *Id.* at 1309.

³⁵ *Id.* at 1314, 1316. Judge J. Skelly Wright dissented. *Id.* at 1319-29. In an earlier case, the district court had enjoined the Public Printer from publishing a House Internal Security Committee Report, which if published would have resulted in an abridgement of freedom of speech and association. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970). However, that action had been dismissed against the congressmen-defendants and the committee's chief counsel, and normal publication in the *Congressional Record* was permitted. *Id.* at 1183.

³⁶ *See pp.* 1171-77 *infra*.

³⁷ *See pp.* 1122-33 *infra*. A less expansive position was taken in the amicus briefs submitted in *Gravel v. United States*, 408 U.S. 606 (1972), by the United States Senate, the American Civil Liberties Union and the Unitarian Universalist Association. These groups argued that a balance of competing social interests

took a rather different position, urging the Court to deny Senators Gravel and Brewster immunity from executive and judicial action while seeking to protect Representative McMillan from a charge of violating the rights of citizens.

With the *Gravel*, *Brewster* and *McMillan* cases before it, the Supreme Court had an opportunity to spell out the limits and uses of a clause which had not emerged in so many diverse contexts in 200 years of constitutional history. Involved were basic issues of separation of powers, executive dominance and congressional decline, the people's right to know, the ability of Congress to discipline itself free from hostile executive or judicial action, and the ability of citizens to protect their rights from invasion by congressional committees. An important provision of the Constitution, adopted at the Convention with almost no debate³⁸ and viewed as axiomatic for most of our history, has thus become the source of controversy and doubt. The purpose of this Article is to propose a general theory for the construction of the speech or debate clause. We begin this analysis with a detailed and admittedly revisionist examination of the development and historical purpose of the speech or debate privilege in both England and this country. We then examine the continuing viability of that purpose in our present form of government, and suggest how the general theory which we advocate should be applied to specific contemporary situations. Finally, because our conclusions differ from those of a majority of the Supreme Court in *Gravel* and *Brewster*, and because considerable and justifiable alarm has been expressed by constitutional scholars in Congress,³⁹ we end this Article with a discussion of several legislative remedies which may restore this essential constitutional provision to its proper role in our governmental system.

II. THE HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The roots of the speech or debate clause, perhaps more than those of any other constitutional prohibition, can be traced directly to historical antecedents, to the bitter and prolonged dispute between Crown and Parliament which disrupted England

requires that those who assist congressmen in the performance of their legislative tasks should be immune from judicial inquiry in executive-motivated suits though not in private civil suits, but that congressmen themselves should be immune from all forms of judicial review. Our resolution is somewhat different. See pp. 1171-77 *infra*.

³⁸ See pp. 1135-40 *infra*.

³⁹ See, e.g., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 118 CONG. REC. 13,610 (daily ed. Aug. 16, 1972) (speech of Senator Ervin).

for centuries. Even the language of our clause is taken almost verbatim from the English Bill of Rights of 1689.⁴⁰ Although the historical definition of the privilege is neither obvious nor uncontroversial, the particular historical view which one adopts is crucial to one's contemporary construction of the scope of the speech or debate clause. The traditional historical view perceives the privilege as static from an ancient inception, as unchanging over the several hundred years during which it has been recognized.⁴¹ This approach defines the privilege according to its literal terms, insulating legislative debate from any form of outside interference and fostering a contemporary construction of the privilege which is in one sense narrow, and in another, expansive. In cases involving conflicts with the executive, the literal approach does not extend the reach of the privilege beyond legislative functions which are necessarily intertwined with speech or debate on the floor of Congress; the literal language of the speech or debate clause is thus construed to include voting, committee hearings, and legislative debate, but nothing more.⁴² On the other hand, the traditional view does not distinguish the kinds of cases in which successful assertion of the privilege would frustrate its own historic objectives and would maintain the privilege with respect to civil suits.⁴³ A major thesis of this Article is that the literal theory of the privilege represents a fundamentally incorrect view of its history and leads to undesirable consequences for our system of government. The functional approach which we advocate views the privilege as evolving dynamically in response to changing governmental functions in order to fulfill the historic purpose of the privilege—the preservation of legislative independence in a system of separation of powers.⁴⁴ This approach

⁴⁰ See pp. 1129–30 *infra*.

⁴¹ This view is expressed in the leading American treatise dealing with the subject, C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23–32 (1970). See also 1 W. ANSON, *LAW AND CUSTOM OF THE CONSTITUTION* 159–60 (4th ed. 1909); F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 241–43 (1926).

⁴² See *Gravel v. United States*, 408 U.S. 606, 624–27 (1972); *United States v. Brewster*, 408 U.S. 501, 512–16 (1972).

⁴³ See, e.g., *United States v. Brewster*, 408 U.S. 501, 516 (1972); *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930).

⁴⁴ Our analysis builds upon the ground-breaking research of J.E. Neale, who has studied the development of the privilege during the Elizabethan era, which was a formative period in its history. See Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 147–76 (E. Fryde & E. Miller ed. 1970). Neale's work was first published in 1924. Neale, *The Commons' Privilege of Free Speech in Parliament*, in *TUDOR STUDIES* 257–86 (R. Seton-Watson ed. 1924). It has had some impact upon the thinking of constitutional scholars in England. For example, the fourth edition of Taswell-Langmead's classic work, which is the last edition to retain his original text, sets

broadly defines the sphere of contemporary legislative functions protected by the speech or debate clause in executive-legislative conflicts, and it circumscribes the degree to which the privilege may preclude judicial review in certain private civil cases.

A. *The Evolution of the Privilege in England*

As first conceived in England, the free speech privilege afforded no protection to legislators against the actions of a hostile monarch. Parliament's privileges originated in the fourteenth and fifteenth centuries out of a conception of Parliament as a *judicial* body, the highest court of the land, and a concomitant assertion that lower courts could not entertain actions challenging the propriety of deliberations in a higher court.⁴⁵ In addition to freedom of speech, a number of other privileges were claimed, including freedom from civil arrest and the right to punish members and outsiders for contempt, rights which also derived from judicial antecedents.⁴⁶ Given this judicial origin, the initial scope of the free speech privilege was necessarily limited to protecting the speeches and debates of members of Parliament from the interference of private persons through the courts.⁴⁷ The judicial

forth the traditional historical view, T.P. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL LAW* 284-85, 300-05 (4th ed. 1898) [hereinafter cited as TASWELL-LANGMEAD (4th ed.)], while the most recent edition, edited by Plucknett, adopts Neale's approach. T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 245-51 (11th ed. 1960) [hereinafter cited as TASWELL-LANGMEAD (11th ed.)].

⁴⁵ See generally C. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* 229-46 (1910); Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 147-76 (E. Fryde & E. Miller ed. 1970); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 *SUFFOLK L. REV.* 1, 3-5 (1968). For the early origins of one privilege, see note 48 *infra*.

⁴⁶ See generally C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (1921). The privilege against arrest was first codified in a statute of Henry IV, which provided that members of Parliament and their servants were immune from arrest during session and shortly before and after. See D. BARRINGTON, *OBSERVATIONS ON THE MORE ANCIENT STATUTES* 372 (4th ed. 1775). But this privilege never applied to actions instituted by the Crown: "treason, felony and surety of the peace" cases. T. MAY, *TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 90, 100-01 (B. Cocks ed. 1971).

⁴⁷ *Strode's Case*, discussed in TASWELL-LANGMEAD (11th ed.) at 247-49, is an excellent illustration of the original meaning of the privilege. In 1512, a private complaint was filed against Richard Strode, a burgess of Parliament, because he had voted in favor of a bill controlling abuses against tin miners. He was convicted and imprisoned by a local court, and when he petitioned Parliament for a remedy, a special bill was passed setting him free. 4 Henry VIII, c. 8 (1512). As Neale points out, this case

has no concern with the relations of the crown and the commons. The act

privilege was a corollary of sovereign immunity: the personal delegates of the King were answerable only to him for their official conduct.⁴⁸ Although this somewhat narrow scope of the privilege was to plague Parliament during subsequent confrontations with the Crown, no claim was made by Parliament, even through the early 1500's, that the King was obliged by law, custom, or history to refrain from interfering with its deliberations. It was not until 1542, a century and a half after the privilege was first conceived, that freedom of speech or debate was first recorded as an asserted right in the Speaker's Petition, which defined, albeit vaguely, the relations of Parliament and the Crown.⁴⁹

The free speech privilege evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.⁵⁰ As the powers of the king's council decayed in the

concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court.

Neale, *supra* note 44, at 160 n.45. See also McILWAIN, *supra* note 45, at 219-22. More than 150 years later, when the Commons' functions had conflicted with the Crown's prerogatives and Parliamentary independence was established, this Act was declared to be a general act, applicable to the Crown as well as private parties. See note 70 *infra*.

⁴⁸ See, e.g., Floyd & Barker, 77 Eng. Rep. 1305, 1307 (Star Chamber 1608); cf. *Randall v. Brigham* 74 U.S. (7 Wall.) 523, 539 (1868). See also 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 159-60 (2d ed. 1937). The privilege of freedom from arrest, which appears to be the earliest recorded privilege, originated in royal proclamations stating that all members going to or from Parliament were under the prescriptive protection of the King, who summoned them. In 1290, Edward I decreed that distraints against members of the King's council in time of Parliament were forbidden; and in 1314 Edward II issued writs to stay all actions by assize against members of either house during a session. The first instance in which a breach of this privilege was remedied occurred in 1315, when the Prior of Malton was placed under civil arrest while returning from Parliament. The King declared the arrest to be an act done in contempt of the Crown and gave the prior a right to damages. See J. JOLLIFFE, CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 452-53 (4th ed. 1961); 3 W. STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 512-14 (4th ed. 1946).

⁴⁹ Neale, *supra* note 44, at 157.

⁵⁰ This expansion of the scope of Parliament's speech or debate privilege must be attributed to the assumption of legislative prerogatives by the House of Commons. The House of Lords was created as a judicial body and remains the highest appellate court in England. The House of Commons originally assumed the quasi-judicial function of acting upon private petitions and thus shared with Lords the judicially defined speech or debate privilege. See McILWAIN, *supra* note 45, at 202-05; Neale, *supra* note 44, at 151-52. But Commons gradually expanded its prerogatives, and with them the scope of Parliament's speech or debate privilege. See pp. 1124-35 *infra*. Although most of the controversies surrounding the privilege concerned the prerogatives of Commons, sympathetic dissidents in the House of Lords also bore the brunt of Royal displeasure. On one occasion, Charles I (1625-1649) forbade the Earl of Arundel to attend Parliament. See 6 S. GARDINER,

late fifteenth and early sixteenth centuries, the House of Commons asserted growing authority over bills submitted by the Crown and sought to construct a shield against the King's oft-expressed displeasure.⁵¹ It was "out of this need for unrestrained criticism of government measures" that the House attempted to transform the free speech privilege into a guarantor enforcing a nascent system of separation of powers.⁵² The privilege was therefore formalized into the Speaker's Petition in 1542,⁵³ and the first comprehensive definition of the expanded version of the privilege was articulated by a courageous and harassed member, Peter Wentworth, in 1575.⁵⁴ But the Crown, emphasizing

HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 91-94 (1965); TASWELL-LANGMEAD (11th ed.) at 364-65. But despite such opportunities for members of Lords to assert their privileges against the King, we could find no occasion upon which they did so. Nevertheless, when Commons asserted the speech or debate privilege, it did so on behalf of all of Parliament, and the expanded privilege must apply to Lords as well as Commons.

⁵¹ Neale, *supra* note 44, at 163-64. When Parliament's initiative was by petition, there was no real threat to the wide powers of the Crown, since the petition was only a request for a remedy and the King's response became the statute. Of course, the King could and often did qualify the sense of the petition in his reply and thereby mold the statute. However, when the bill procedure was introduced, the King's power of modification was eliminated, and he could only assent to or veto the bill. *Id.* at 170-72. The bill was thus the actual text of law, enforceable in the courts, and the veto was an unreliable weapon. Elizabeth tried, therefore, to reinstitute the old petition procedure, but did not succeed. However, the House needed protection against more direct interference with their debates. *Id.* at 170-72. Thus, the speech or debate privilege did not arise independently of the change in Parliament's functions, but as a result of it.

⁵² *Id.* at 163-64.

⁵³ *Id.* at 157; see note 58 *infra*.

⁵⁴ Wentworth began his remarkable speech by complaining that in the last session of Parliament, "I saw the Liberty of free Speech, the which is the only Salve to heal all the Sores of this Common-wealth, so much and so many ways infringed." S. D'EWES, JOURNAL OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 236 (1682). Free speech was insecure, he said, as long as the House heeded the Crown's commands to cease discussion into matters involving its prerogatives. *Id.* at 236-37. He then asserted the absolute and exclusive right of the House to control the parameters of debate:

... The King ought not to be under man, but under God and under the Law, because the Law maketh him a King ... [and] free Speech and Conscience in this place are granted by a special Law, as that without which the Prince or State cannot be preserved or maintained ...

... it is a dangerous thing in a Prince to oppose or bend herself against her Nobility and People ... And how could any Prince more unkindly intreat, abuse, oppose herself against her Nobility and People, than her Majesty did the last Parliament? ... is it not all one thing to say, Sirs, you shall deal in such matters only, as to say, you shall not deal in such matters? and so as good to have Fools and Flatterers in the House, as men of Wisdom ... It is a great and special part of our duty and office, Mr. Speaker, to maintain the freedom of Consultation and Speech, for by this, good Laws ... are made ... for we are incorporated into this place, to serve God and all England, and not to be Time-Servers ... or as Flatterers that would fain beguile all the World ... [b]ut let us show our-

the "judicial" theory of the privilege, vehemently denied that it was bound by such a transformation,⁵⁵ and through the reigns of Henry VIII⁵⁶ and Elizabeth I⁵⁷ the privilege afforded no real protection for "licentious" discussions of matters involving the prerogatives of the Crown.⁵⁸

selves a People endured with Faith . . . that bringeth forth good Works . . . Therefore I would have none spared or forborn that shall from henceforth offend herein, of what calling soever he be, for the higher place he hath the more harm he may do . . .

Id. at 238-40. Immediately following this audacious speech Wentworth was placed under arrest, interrogated, and imprisoned for 1 month. *Id.* at 241-46. The persecution of Wentworth, and his elaborate defense on the grounds of privilege, are described by Cella, *supra* note 45, at 8-9.

⁵⁵ See S. D'EWES, JOURNAL OF ALL THE PARLIAMENT DURING THE REIGN OF QUEEN ELIZABETH 175-76, 259, 269, 284, 410-11, 478-79 (1682).

⁵⁶ 1509-47.

⁵⁷ 1558-1603.

⁵⁸ See 4 HOLDSWORTH, *supra* note 48, at 89-93; Neale, *supra* note 44, at 159-60, 164-65. Analysis of the development of freedom of speech and debate is made difficult by the fact that during subsequent confrontations with the Crown, Parliament was to argue that the privilege had been understood from ancient times to bar intrusions by the Crown. See, e.g., *Protestation of December 18, 1621*, in TASWELL-LANGMEAD (11th ed.) 357-58; argument of counsel in Proceedings against Sir John Eliot, Denzil Hollis and Benjamin Valentine, 3 HOW. ST. TR. 294, 295-97, 302-04 (1629). But the only two pieces of evidence ordinarily advanced in support of this proposition do not withstand analysis:

(a) Some historians and judges have cited *Haxey's Case* in 1399 (unreported) as an early assertion of the privilege against the Crown. See, e.g., MAITLAND, *supra* note 41, at 241-42; WITKE, *supra* note 46, at 23-24; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910); cf. *Barr v. Matteo*, 360 U.S. 564, 578, 579 n.2 (1959) (Warren, C.J., dissenting). Haxey was a clerical proctor serving as keeper of the rolls in the Court of Common Pleas. He introduced a private bill to reduce the expenditures of the royal household, for which he was tried and convicted of treason. In the first year of Henry IV, he successfully petitioned the King in Parliament for a reversal of this judgment as being "encontre droit et la course quel avoit use devant en Parliament en anientisement des custumes de lez communes." See TASWELL-LANGMEAD (11th ed.) 174-75, citing 3 Rot. Parl. 434 n.104. But Neale has shown that the petition did not represent a claim of parliamentary privilege, but was grounded either upon procedural irregularities in the trial or upon the contention that Haxey's offense did not amount to treason. Neale, *supra* note 44, at 149; see also TASWELL-LANGMEAD (11th ed.) 174-75. If *Haxey's Case* did deal with the speech or debate privilege, it would be very difficult to explain why this privilege was not asserted in the Speaker's Petition until a century and a half later.

(b) In its battles with Charles I (1625-1649), Parliament was to argue that the act in *Strode's Case*, *supra* note 47, was originally intended to be an absolute prohibition against any prosecution of members for speeches in Parliament. See Proceedings against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, 3 HOW. ST. TR. 294, 297 (1629). Some historians seem to agree, see, e.g., WITKE, *supra* note 46, at 25-30; cf. *United States v. Johnson*, 383 U.S. 169, 182 n.13 (1966). But there is evidence which points the other way. In 1523, only 11 years after *Strode's Case*, and in the midst of one of the first of a series of major conflicts between Parliament and the Crown, Sir Thomas More, Speaker of the House

The increasing independence and legislative authority of the House of Commons was a powerful force, and increasing legislative cognizance was taken of matters once thought to be within the Crown's exclusive domain, such as the conduct of foreign policy and the succession. The House began to conceive of itself seriously as Grand Inquest of the Nation, demanding "a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion."⁵⁹ The consequent intrusions into the Crown's prerogatives led to a century-long battle⁶⁰ over Parliament's freedom of speech or debate, with the Tudor and Stuart monarchs claiming the inherent sovereign right to defend their prerogatives by interfering in Commons' debates and punishing members for "seditious" and "licentious" speech. If the privilege was to serve as an effective instrument of security for Parliament, a broader and more absolute definition, which would protect those speeches concerning matters within the House's expanded jurisdiction, was essential.⁶¹

This dispute over the scope of the privilege was characterized

of Commons, begged Henry VIII to show tolerance towards displeasing opinions expressed during the course of debate:

[T]he wisest man and best spoken in a country happens on occasion while his mind is fervent on a matter, to speak in such-wise as he would afterward wish not to have done, and would so gladly change: therefore, most gracious Sovereign, considering that in all your high Courts of Parliament there is nothing treated but matters of weight and importance concerning your realm, and your own royal estate, it could not fail to hinder and put to silence from giving their advice many of your discreet Commons, unless they were utterly relieved of all doubt and fear how anything they should happen to speak should by your Highness be taken: and on this point your well-known benignity puts every man in right good hope.

. . . . It may therefore please your most abundant Grace, our most gracious King, to give to all your Commons here assembled, your most gracious licence and pardon freely, without doubt of your dreadful displeasure, for every man to discharge his conscience, and boldly in everything incident among them to declare his advice; and whatsoever any man happens to say, it may please your noble Majesty

ROPER'S LIFE OF MORE, IN THE UTOPIA OF SIR THOMAS MORE 218-19 (Campbell ed. 1947). There is nothing in this language which suggests that More, or the burgesses for whom he was speaking, regarded freedom of speech and debate as a claim of natural inheritance which must be honored by the Crown. *See also* note 71 *infra*.

⁵⁹ 1 W. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 35 (5th ed. 1922)

See also McILWAIN, *supra* note 45, at 173-89.

⁶⁰ Roughly, 1575-1688.

⁶¹ *See* ANSON, *supra* note 59, at 160-161.

The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one.

See also 4 HOLDSWORTH, *supra* note 48, at 178.

by systematic harassment of members who dared criticize the Crown — the King claiming that the privilege ended where his prerogatives began and the House declaring that the privilege was absolute for any matter touching parliamentary business.⁶² The methods of intimidation employed by the Crown and objected to by Parliament as a breach of privilege took a wide variety of forms. The Crown's arsenal included the practices of issuing direct orders to the Speaker to cease debate on sensitive topics, spreading rumors of royal displeasure and threats of retaliation, bribing corruptible members of Parliament, summarily arresting others and arraigning them before the Star Chamber and other secret, inquisitorial bodies, or committing them directly to the Tower of London.⁶³ Apparently out of a need to legitimize its position in the face of increasing popular displeasure, the Crown turned to the courts for both assistance and vindication. The battle culminated when Sir John Eliot and other members of Commons, who opposed funding what they considered to be a needless and bloody war against France, were prosecuted in 1629 for making "seditious" speeches in the House.⁶⁴ The judges of the King's Bench agreed with the Crown that the judicial foundation of freedom of speech or debate precluded "seditious" speeches from its scope, and therefore rejected Eliot's plea of privilege.⁶⁵ He was convicted for seditious libel and ordered

⁶² See 4 HOLDSWORTH, *supra* note 48, at 89-93; Neale, *supra* note 44, at 159-60, 164-65.

⁶³ See generally TASWELL-LANGMEAD (11th ed.) 174-76, 194-96, 312-16, 353-79.

⁶⁴ *Id.* at 362-65, 375-78.

⁶⁵ Proceedings Against Sir John Elliot, Denzil Hollis and Benjamin Valentine, 3 HOW. ST. TR. 294 (1809) (*Eliot's Case* was decided in 1629). It is noteworthy that Eliot's counsel based his plea against the court's taking jurisdiction on a functional perspective, arguing that the privilege applied even to speeches characterized as "seditious" because of the accusatory and inquiring function of Parliament:

The words [of the speech] themselves contain several accusations of great men; and the liberty and accusation hath always been parliamentary So it is the duty of the commons to enquire of the Grievances of the Subjects, and the causes thereof, and doing it in a legal manner . . . [and] parliamentary accusation, which is our matter, is not forbidden by any law.

Id. at 295-96. He also relied on the judicial origins of the privilege:

Words spoken in parliament, which is a superior court, cannot be questioned in this court, which is inferior.

Id. at 296. In rejecting the plea, the judges addressed themselves *only* to the latter proposition. Justice Whitlocke said:

[W]hen a burgess of parliament becomes mutinous, he shall not have the privilege of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissioners of Oyer and Terminer, because this is no judicial act of the court.

Id. at 308. And Chief Justice Hyde added:

As to what was said, That an inferior court cannot meddle with matters

imprisoned "during the king's pleasure."⁶⁶

The conviction and imprisonment of Eliot and others crystallized opposition to the dictatorial rule of Charles I and was a significant factor leading to the Civil War and the execution of the King.⁶⁷ In 1641, with the beginning of the Long Parliament and a full century after Commons had taken the first tentative step of incorporating the privilege into the Speaker's Petition, the House declared Eliot's trial to be an illegal infringement of speech and debate.⁶⁸ There followed a series of resolutions and acts by both Houses, before and following the Restoration,⁶⁹ guaranteeing the privilege in absolute terms.⁷⁰

During this entire developmental period the speech or debate privilege was not an end in itself, but an essential mechanism for the protection of the legislature's changing functions. Even prosecutions such as Eliot's would not have been condemned in earlier years;⁷¹ it was only when Commons seriously asserted its

done in a superior [court]; true it is . . . but if particular members of a superior court offend, they are oft-times punishable in an inferior court . . .

Id. at 307.

⁶⁶ *Id.* at 310. Eliot died in prison three years later.

⁶⁷ See 2 R. GNEIST, HISTORY OF THE ENGLISH CONSTITUTION 243-44 (1886); cf. Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (Frankfurter, J.); WITKE, *supra* note 46, at 103-06. See also 7 S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 77-122 (1965).

⁶⁸ This resolution is reprinted in 3 HOW. ST. TR. 310-311 (1809). Except for the Short Parliament of 1640, the first opportunity for the House to invalidate Eliot's conviction and establish the absolute scope of the privilege was the year 1641, since Charles I governed dictatorially without Parliament from 1630 until the Civil War. TASWELL-LANGMEAD (11th ed.) 378-93.

⁶⁹ Following the interregnum, Charles II was restored to the Crown in 1660.

⁷⁰ For example, in 1667 both Houses resolved that the special act in *Strode's Case* was a general law. See 3 HOW. ST. TR. 314-15 (1809). In 1668, the House of Lords reversed the convictions of Eliot, Hollis and Valentine. 12 H.L. JOUR. 223 (1668); TASWELL-LANGMEAD (11th ed.) 378 n.55. In order to emphasize the permanence of its expanded jurisdiction, the House of Commons developed an interesting symbolic practice, which still persists, reminding the King of its initiative in legislation: at the beginning of each session, a bill is read pro forma before the King's speech is considered. See ANSON, *supra* note 59, at 67.

⁷¹ The Commons' protestations in *Eliot's Case* may be compared with earlier instances of passive acquiescence to the imprisonment of its members by the Crown. For example, in 1450, Sir Thomas Yonge, a member from Bristol, moved in Commons that, the King having no issue, the Duke of York should be declared heir-apparent. Henry VI, who resented this apparent meddling with his prerogative to determine the succession, ordered Yonge arrested and summarily imprisoned in the Tower of London. Yonge remained in the Tower for the next five years, and there is no record of any protest from Commons during this period. In 1455, the Duke of York was appointed protector, and Yonge petitioned Commons to plead his cause with the Crown. The Commons forwarded Yonge's petition to the House of Lords, and Henry VI directed the Lords to grant whatever relief they believed was "convenient and reasonable." TASWELL-LANGMEAD (4th ed.) 303. A comparison of these two cases provides additional evidence that the scope of the

right to function as the Grand Inquest that "restrictions hardly noticed before were bitterly resented; and the illusion of freedom gradually vanished from men's minds."⁷² In short, as the circumstances and need for the privilege were fluid, so too was its operative scope. It is incorrect simply to view this prolonged dispute over the scope of the privilege as involving blatant and intentional violations by hostile monarchs, with the assistance of dishonest "lackey" judges, of the ancient, absolute, and well-defined rights of Parliament.⁷³ A more complex picture emerges from this history. To be sure, although the Tudor and Stuart monarchs were extremely hostile to developments in Parliament which threatened their prerogatives, and although they obtained assistance from judges who were no doubt devoted to maintaining the status quo, it is nonetheless true that their arguments for restricting the privilege were hardly insubstantial. To those with legalistic minds and an inclination to power in the executive, the assertions for an expanded concept of the privilege arguably represented an unwarranted attempt by irresponsible members of Parliament to abuse their position of trust and to put themselves above the law. This issue, of course, was not settled by an abstract consideration of opposing legal theories; it was settled by the historical development and popular acceptance of an independent legislative branch.

1. *The Case of Sir William Williams* — The evolution of the free speech privilege did not end with the Restoration; there followed another cataclysmic confrontation between the Crown and Parliament which was an immediate cause of the Revolution of 1689, the exile of James II, and the enactment of the English Bill of Rights. This confrontation is of considerable importance inasmuch as the speech or debate clause in our own Constitution was taken almost verbatim from the like provision of the English Bill of Rights.

The grievance which gave rise to the legislative free speech provision is set forth clearly in the preamble to the Bill of Rights, charging King James with subverting the Protestant religion and the laws and liberties of the Kingdom by initiating prosecutions for matters "cognizable only in Parliament."⁷⁴ Corresponding to this article of grievance was the declaration:⁷⁵

that the freedom of speech and debates or proceedings in Parliament was not static, but evolved dynamically. *But see* WITTKE, *supra* note 46, at 24-25.

⁷² Neale, *supra* note 44, at 175.

⁷³ Such a view was expressed forcefully by Mr. Justice Harlan in *United States v. Johnson*, 383 U.S. 169, 178 (1966).

⁷⁴ 1 W. & M. Sess. 2, c. 2 (1689).

⁷⁵ *Id.*

liament ought not to be impeached or questioned in any court or place out of Parliament.

This provision was not by its terms confined to spoken words and could not have been so intended, consistent with the circumstances which led to its creation. The last prosecution for words spoken in Parliament is found in *Eliot's Case* in 1629, during the reign of Charles I, and that conviction had been reversed by writ of error by the House of Lords in 1668.⁷⁶ The only reported prosecution of a member by James II was against Sir William Williams in 1686–88 for having ordered the republication of a House committee report which alleged misconduct by the King, his family and his advisors.⁷⁷ The King based this prosecution on the legal argument that prior history and cases had carefully and narrowly defined the free speech privilege to provide absolute immunity only for speeches, debates and votes within the walls of Parliament.⁷⁸ In response, Parliament asserted that the privilege encompassed all of the ordinary and necessary functions of the legislature and that the publication of proceedings was such a function.⁷⁹ The immediate purpose of the speech or debate clause of the English Bill of Rights, adopted in specific response to the Williams trial, was to confirm this broader construction for posterity.⁸⁰

The great case of Sir William Williams arose out of circumstances beginning in the reign of Charles II, when the House of Commons, of which Williams was Speaker, received a number of narrative reports about an alleged "popish plot" between the King, his relatives and advisors, and the King of France to restore Catholicism as the established religion of England and to prevent the free exercise of religion by Protestants.⁸¹ The most famous of these was Dangerfield's Narrative, which in lurid detail set forth

⁷⁶ See note 70 *supra*; WITTKE, *supra* note 46, at 106.

⁷⁷ *Rex v. Williams*, 89 Eng. Rep. 1048 (K.B. 1688). See Report of the House Committee on the Privileges of Parliament (1771), reprinted in 8 How. St. Tr. 16–17 (1809).

This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of Parliament, that it appears to your Committee to be the principal, if not the sole object of the first part of the eighth head [paragraph] of the means used by king James to subvert the laws and liberties of this kingdom, as set forth in the Declaration of the two Houses.

See also McILWAIN, *supra* note 45, at 242–44; W. TOWNSEND, HISTORY OF THE HOUSE OF COMMONS 412–16 (1843).

⁷⁸ See Proceedings Against Sir William Williams, 13 How. St. Tr. 1370, 1377–79 (1684–1695).

⁷⁹ *Id.* at 1410–15.

⁸⁰ See p. 1133 *infra*.

⁸¹ See generally J. POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II (1903).

such allegations against some of the most prominent members of the royal court. A committee of the House received these narratives, the report containing them was entered in the Commons Journal, and the House then gave permission to several of its members and outside printers to publish the narratives and other papers relating to the popish plot.⁸² Williams, the Speaker, requested and received permission to publish Dangerfield's Narrative.⁸³ Sir William Courtney, among others, went on record to support the reason for the printing:⁸⁴

Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt but it will do so to those who are the enemies of our religion and liberties.

A number of prosecutions were instituted by Charles II against virulently anti-Catholic spokesmen.⁸⁵ All were found guilty of seditious libel or high treason by the judges of the King's Bench.⁸⁶ Yet even Charles II dared not attack members of Parliament. It was not until 1686, a year after James II succeeded to a turbulent throne, that the King ordered the filing of an information in the King's Bench against Sir William Williams for the publication of Dangerfield's Narrative.⁸⁷

Williams was represented by Sir Robert Atkyns, a former judge of the Court of Common Pleas, who came out of retirement to argue on behalf of the speech or debate privilege of the House.⁸⁸ Atkyns' argument contained a remarkable exposition of

⁸² See 9 H.C. JOUR. 630-95 (1680). The printing began in 1680 and continued through 1681 as new information was received. See *id.* at 709, 711.

⁸³ *Id.* at 649.

⁸⁴ 2 J. TORBUCK, A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND 96 (1741). (Courtney's statement was made on March 24, 1681.) Another member said, less ominously:

The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions.

Id. at 92.

⁸⁵ The earlier cases includes the Trial of William Stayley, 6 How. ST. TR. 1501 (K.B. 1678); Trial of Edward Coleman, 7 How. ST. TR. 1 (K.B. 1678); Trial of Ireland, Pickering and Grove, 7 How. ST. TR. 79 (K.B. 1678); Trial of Whitehead, Harcourt, Fenwick, Gawen and Turner, 7 How. ST. TR. 311 (K.B. 1679); Trial of Langhorn, 7 How. ST. TR. 417 (1679).

⁸⁶ See POLLOCK, *supra* note 81, at 265-87.

⁸⁷ Proceedings Against Sir William Williams, 13 How. ST. TR. 1370 (1684-1695).

⁸⁸ Atkyns had been dismissed from the bench for contradicting a dictum of Chief Justice Scroggs that "the presentation of a petition for the summoning of Parliament was high treason." POLLACK, *supra* note 81, at 286.

the origin, development and purposes of the privilege. He traced the history of the privilege from its early judicial antecedents, which he claimed settled the principle that anything said or done in Parliament could not be questioned in any inferior court.⁸⁹ He then argued on a functional basis that the privilege encompassed actions of members in effectuating the powers of Parliament. He saw those powers as three-fold: a legislative power, in the enactment of statutes; a judicial power, when acting as the High Court; and a counselling, or enquiring, power, which serves both the legislative and judicial powers.⁹⁰ As evidence of this third function he cited the obligation of the House to investigate matters of state, expose corruption and maladministration, punish offending ministers and offer guidance to the king.⁹¹

Atkyns tied Williams' printing of the report to the enquiring function.⁹² He asserted, in fact, that this function was necessary for the accomplishment of all of the House's powers.⁹³ Atkyns then responded to the Attorney General's contention that Williams' act of publication was outside the scope of the privilege. As a matter of common sense, he said, this was absurd.⁹⁴ The narrative had already been made public when read before the bars of both houses and entered in their Journals; the publishing in print changed nothing.⁹⁵ Finally, Atkyns asked rhetorically, "what need was there of printing it?"⁹⁶ and responded that the members of the House, "out of a sense of their duty,"⁹⁷ might decide that it was necessary to inform and alert the public of Dangerfield's charges against high ministers. An enlightened public might then be encouraged to come forward and offer more information, "a fuller proof" that could lead to the prosecution,

⁸⁹ 13 How. St. Tr. 1370, 1383-1407 (1684-1695).

⁹⁰ *Id.* at 1410-13.

⁹¹ *Id.* at 1413.

⁹² *Id.* at 1414.

⁹³

[T]he enquiry is the most proper business of the House of Commons.

For this reason they are commonly styled The Grand Inquest of the nation. . . .

This enquiry of theirs is necessary in a subserviency to *all* the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature.

. . . .
Or it may be in order to their counselling power, for removal of great officers or favorites. . . .

But still they first make enquiry . . . [and] the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed.

Id. at 1414-15 (emphasis added).

⁹⁴ *Id.* at 1415-17.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1416.

⁹⁷ *Id.* at 1418.

removal, or clearing of the ministers.⁹⁸ Publication of the report was a good way of conducting this further enquiry and had become "a most frequent practice . . . the most ordinary way of making enquiries, which run into all parts of the nation."⁹⁹

Atkyns' argument was thus a forerunner of a standard applied two hundred years later by our Supreme Court — that the privilege protects "things generally done . . . by . . . members in relation to the business" before the legislature.¹⁰⁰ In other times, this argument might have succeeded, but James II dismissed the judges of the King's Bench and caused Williams to be tried by judges who were staunch believers in absolute monarchy.¹⁰¹ The plea of privilege was rejected, and Williams was fined ten thousand pounds.¹⁰²

Shortly after James II was sent into exile, a committee was appointed by the House of Commons to draft what was to become the English Bill of Rights, a proclamation for "better securing our Religion, Laws, and Liberties."¹⁰³ The committee was chaired by Sir George Treby and included Sir William Williams.¹⁰⁴ The committee reported back, and Treby said of the free speech guarantee:¹⁰⁵

This Article was put in for the sake of one, once in your place [*i.e.*, the Speaker], Sir William Williams, who was punished out of Parliament for what he had done in Parliament.

A delegation with Williams at its head was then sent to the House of Lords, and in February of 1689 the two Houses agreed upon the broad language of the Bill of Rights.¹⁰⁶ In July, the House of Commons passed a specific resolution that the judgment of the King's Bench against Williams "was an illegal Judgment, and against the Freedom of Parliament."¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

¹⁰¹ See TOWNSEND, *supra* note 77, at 413; *cf.* 6 HOLDSWORTH, *supra* note 48, at 502-05.

¹⁰² See *Rex v. Williams*, 89 Eng. Rep. 1048 (1688). Williams paid 8,000 pounds, and the King acknowledged satisfaction. *Id.* For Williams' subsequent role as legal spokesman for James II, see note 175 *infra*.

¹⁰³ 10 H.C. JOUR. 15 (January 29, 1689).

¹⁰⁴ *Id.*

¹⁰⁵ 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1763), *reprinted in* REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACT 24 (H.C. 1939).

¹⁰⁶ 10 H.C. JOUR. 21.

¹⁰⁷ *Id.* at 215. A bill to reverse the conviction and compensate Williams for the fine was sent to the House of Lords. The Lords did not act favorably upon it because that would have required payment to Williams of the not insubstantial amount of 8000 pounds from a greatly depleted treasury. TOWNSEND, *supra* note

2. *A Note on the Seven Bishops Case.* — The great historical battles in England over freedom of speech or debate occurred as a result of legislative resistance to the Crown's vigorous assertions of executive prerogatives. This conflict over the respective powers of the executive and legislative branches is at the core of the development of the privilege. During the Tudor and early Stuart era, at stake was not only the ability of Parliament to deliberate freely, but also the maintenance of its power to function in areas such as foreign policy and the succession, which the executive claimed as solely within its province.

The seminal case of Sir William Williams should be viewed in this perspective. The Crown's motivations for attempting to stifle the Speaker of the House reflected more than chagrin over the revelations of an alleged "popish plot," or even a desire to cut off Parliament's informing function. The prosecution was an integral part of the executive's plan to extend its prerogatives and establish effective dominance over the divisive issue of religion. It was hoped that a Parliament rendered passive by successful violations of its privileges would not effectively oppose the ultimate objective of the executive, to suspend some of the fundamental laws of the nation and to place Parliament in a position subservient to the Crown.¹⁰⁸

In April of 1687, shortly after the indictment of Sir William Williams, James II published a Declaration of Indulgence declaring it to be his "royal will and pleasure that . . . the execution of all and all manners of penal laws in matters ecclesiastical . . . be immediately suspended."¹⁰⁹ Although this assertion of executive power to nullify statutes passed by Parliament was not completely unprecedented, prior attempts to exercise this prerogative had been infrequent and had not precipitated a constitutional crisis.¹¹⁰ When Charles II had declared the ecclesiastical laws suspended in 1672, the response in the House of Commons was so vehement that the King retracted his declaration and acknowl-

77, at 415. See also 13 How. St. Tr. at 1438-39. Consideration was given to confiscating the estates of Jeffries and Sir Robert Sawyer, who had filed the information against Williams, but the Lords declined to do so in 1695. *Id.*

¹⁰⁸ See TASWELL-LANGMEAD (4th ed.) at 612-13. James was, in fact, largely successful in stifling parliamentary opposition. The Parliament which was assembled after Williams' indictment was exceedingly servile, granting the King, among other things, munificent supplies for the support of a standing army in time of peace. But when opposition to his religious policies began to grow in the House, James dissolved Parliament and, like Charles I before him, governed dictatorially. See *id.*

¹⁰⁹ SELECTED STATUTES, CASES AND DOCUMENTS 389-90 (C.G. Robertson ed. (9th ed. 1949)).

¹¹⁰ See A. POLLARD, THE EVOLUTION OF PARLIAMENT 275-76 (1964); TASWELL-LANGMEAD (4th ed.) 290-93.

edged that the assertion of this prerogative was illegal.¹¹¹

In 1688, James published his Declaration a second time and ordered it to be read in all the churches. When seven bishops, including the Archbishop of Canterbury, petitioned the King to rescind the order, they were charged with seditious libel.¹¹² Despite James' attempt to pack the King's Bench with judges who would obey his will, the court was evenly divided over the legality of the King's actions.¹¹³ The constitutionality of the suspending power was thus left for decision by the jury.¹¹⁴ This prerogative, Mr. Justice Powell told the jurors, amounted, "to an abrogation and utter repeal of all the laws If this be once allowed of, there will need no parliament. All the legislature will be in the King."¹¹⁵ On June 30, 1688, the jury returned a verdict of not guilty.¹¹⁶

The Bill of Rights of 1689 abolished the suspending power, a prerogative which "was in its nature incompatible with the existence of constitutional government."¹¹⁷ The first grievance enumerated in the Bill of Rights was that James II had endeavored to subvert the laws and liberties of the kingdom "[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of Parliament."¹¹⁸ Corresponding to this grievance was the first article of the Bill of Rights: "That the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal."¹¹⁹ Thus the Bill of Rights both abolished the suspending power and guaranteed the speech or debate privilege.¹²⁰ Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers.

B. Historical Developments in the United States

1. The Constitutional Convention. — The speech or debate

¹¹¹ 5 HOLDSWORTH, *supra* note 86, at 222; see SELECTED STATUTES, CASES AND DOCUMENTS, *supra* note 109, at 75-80.

¹¹² See TASWELL-LANGMEAD (11th ed.) 443; Case of the Seven Bishops, 12 HOW. ST. TR. 183, 377 (1688).

¹¹³ 12 HOW. ST. TR. at 421-30.

¹¹⁴ The judges could not agree upon the legal issue about which the jury should be charged, and thus left the entire decision of charge and guilt to the jury. *Id.*

¹¹⁵ *Id.* at 427.

¹¹⁶ *Id.* at 430-31; TASWELL-LANGMEAD (11th ed.) 443.

¹¹⁷ TASWELL-LANGMEAD (4th ed.) 294.

¹¹⁸ W. & M., Sess. 2, c. 2 (1689).

¹¹⁹ *Id.*

¹²⁰ See pp. 1129-33 *supra*.

clause in article I, section 6, is the product of a lineage of free speech or debate guarantees from the English Bill of Rights of 1689 to the first state constitutions¹²¹ and the Articles of Confederation.¹²² Presumably because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention¹²³ and virtually none at all in the ratification debates.¹²⁴ Nevertheless, two aspects of these debates shed considerable light upon the delegates' intentions.

First, the Framers approached the general problem of legislative privilege with extreme meticulousness. At the time of the Convention Parliament claimed a number of privileges, most of

¹²¹ See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Both the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 explicitly declared as the basis of their clauses the principle that free speech or debate in the legislature is "essential to the rights of the people." MASS. CONST., part I, art. XXI; N.H. CONST., part I, art. XXX. See also M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 69-70, 93-131 (1943). Clarke's comprehensive work does not reveal any overt challenge to freedom of speech or debate in the colonial assemblies, nor did we uncover any in our research. As an a priori matter, when one considers the political climate in states such as Massachusetts between 1760 and 1776, this appears quite incredible; the matter surely warrants further study.

¹²² See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Article 5 of the Articles of Confederation provided as follows:

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress

We could find no debate on the language, scope, or purpose of this provision in the Articles Convention. At least two proposals utilizing language similar to that in the Articles were presented to the Constitutional Convention. The Pinckney plan provided:

In each House a Majority shall constitute a Quorum to do business — Freedom of Speech & Debate in the legislature shall not be impeached or Questioned in any place out of it

3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (M. Farrand ed. 1911). And the Convention's Committee on Detail recommended the following language:

Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature

3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 447 (1900). Toward the end of the convention both proposals were referred to the Committee of Style and Arrangement, which without explanation adopted the language of the current speech or debate clause which bars questioning "in any other place." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 567, 593 (M. Farrand ed. 1911). The earlier versions of the privilege invoke the language of the English Bill of Rights, which had singled out the judiciary for special mention due to the seditious libel conviction of Sir William Williams by the King's Bench. See pp. 1129-33 *supra*.

¹²³ See pp. 1138-40 *infra*.

¹²⁴ See 2 ELLIOTS DEBATES 52-54 (Massachusetts), 325, 329 (New York) (2d ed. 1937); 3 ELLIOTS DEBATES 368-75 (Virginia) (2d ed. 1937); 4 ELLIOTS DEBATES 73 (North Carolina) (1st ed. 1863). In the above debates, the speech or debate clause received only cursory mention and was approved without dissent. In each of the other state debates, there is no recorded mention of the clause.

which derived historically from its original judicial character.¹²⁵ Many of these privileges should have fallen into desuetude, given the changing functions of Parliament. Instead, however, they had become instruments of oppression.¹²⁶ Aware of these developments and fearful of legislative excess,¹²⁷ the Framers limited certain privileges and excluded others altogether. For example, the unlimited privilege from arrest and civil process was carefully defined and severely curtailed in article I, section 6.¹²⁸ The general privilege of contempt power, which had been used during the period before the Convention to imprison offending newspapermen,¹²⁹ was withheld entirely from Congress;¹³⁰ and the privilege to determine members' qualifications, as well as the related privileges of exclusion and expulsion of members, were narrowed significantly in light of Wilkes' ordeal.¹³¹

The Framers also inserted a provision in the Constitution which specifically overruled an important and controversial privilege. Since 1641, the House of Commons had a standing rule which forbade the publication of its proceedings either by mem-

¹²⁵ See p. 1122 & notes 45-46 *supra*.

¹²⁶ See notes 128-32 *infra*.

¹²⁷ See, e.g., J. MADISON, THE FEDERALIST NO. 43 (1788): "The legislative department is everywhere . . . drawing all power into his impetuous vortex."

¹²⁸ See generally T. JEFFERSON, MANUAL OF PARLIAMENTARY PRACTICE § 3 (1797-98). See also *Long v. Ansell*, 293 U.S. 76 (1934); *Williamson v. United States*, 207 U.S. 425 (1908). The privilege from arrest had been extended beyond its original scope, see note 46 *supra*, to include not only the persons of members and their servants, but their families and estates as well. Members of Parliament even took to selling "protections" to complete outsiders, who were thus placed beyond the reach of the common law. See WITKE, *supra* note 46, at 41-43. See also I T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 358 (1912). Following the enactment of the English Bill of Rights, statutes were passed eliminating these abuses. The last of these statutes was 10 Geo. 3, c. 50 (1769), which limits the privilege from arrest in terms similar to those of article I, section 6 of our Constitution.

¹²⁹ See I ANSON, *supra* note 59, at 161-64; p. 1138 *infra*.

¹³⁰ Mr. Justice Miller's excellent historical analysis in *Kilbourn v. Thompson*, 103 U.S. 168, 183-89 (1880), demonstrates how this privilege obtained only in bodies of a judicial character.

¹³¹ Wilkes was one of the few honest members of a House of Commons, which had yielded its independence as a result of bribery and cajolery by the Crown. Wilkes' public exposure of this corruption left the House in a virtual frenzy; it passed a resolution, joined by the House of Lords, withdrawing the privilege from him so that he could be tried in the courts for seditious libel. Wilkes went into self-imposed exile until 1768, when he returned to England and was reelected to Parliament. The House thereupon expelled him and he was convicted of seditious libel and sentenced to 22 months of imprisonment. Wilkes was finally vindicated in 1782 when these actions were expunged from the records of the House. Wilkes' experiences and their effects upon the Framers' interpretation of legislative privilege are discussed in *Powell v. McCormack*, 395 U.S. 486, 527-31, 536-42 (1969).

bers or by the press, except by specific leave of the House. This rule was originally justified as insuring secrecy against monarchs who threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates. But the rule was later invoked out of fear of misrepresentation in the press and a general intolerance of public criticism.¹³² The possibility that such a rule could be invoked by the new Congress was inconsistent with the authors' theories of self-government, which presupposed the existence of an informed electorate.¹³³ In addition, the Framers were appreciative of the effects on public opinion and on government caused by publicizing the debates of the colonial assemblies.¹³⁴ They therefore placed in the Constitution a duty of Congress to inform the public about its deliberations.¹³⁵ This provision generated heated argumentation in the ratification debates,¹³⁶ with anti-federalists protesting that it did not go far enough since it allowed the people's representatives to conduct secret proceedings "in their judgment." They were assuaged only after Madison and other influential members of the Convention assured them that the secrecy exception would be invoked only on extremely rare occasions and that the people's representatives could be trusted to exercise considerable restraint in withholding proceedings from the electorate.¹³⁷

Alone among the privileges claimed by Parliament, freedom of speech or debate was placed in the Constitution virtually unchanged. In light of the care with which they approached legisla-

¹³² See 1 ANSON, *supra* note 59, at 161-64.

¹³³ See, e.g., J. MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 434 (1966); 1 THE WORKS OF JAMES WILSON 422 (McCloskey ed. 1967); cf. 4 PAPERS OF JAMES MADISON 236-37 (Hutchenson ed. 1965); 6 WRITINGS OF JAMES MADISON 396-98 (Hunt ed. 1906).

¹³⁴ Following the practice of the House of Commons, the colonial assemblies had enjoined their members from reporting proceedings in order to preserve secrecy of operation from the Crown, or, in their situation, from Crown-appointed governors. CLARKE, *supra* note 121, at 227-34. However, beginning around 1760, several of the assemblies repealed the secrecy rule and opened their proceedings to the public. The immediate effect in one important state, Massachusetts, was that the debates over policies of resistance accentuated the sense of crisis and stirred the people of Boston to "mutiny and rage." J. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 70-71 (1966).

¹³⁵ Art. I, § 5 requires that:

Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

¹³⁶ See, e.g., Patrick Henry's plea in the Virginia Ratification Convention, 3 ELLIOTT'S DEBATES, *supra* note 124, at 170, 315-16, 375-78 (1788).

¹³⁷ See, e.g., *The Virginia Ratification Debates*, 3 ELLIOTT'S DEBATES, *supra* note 124, at 331 (Madison), 401 (Randolph), 409 (Madison), 459 (Mason), 460 (Madison and Mason).

tive privilege generally and the fact that the Framers were competent historians and political theorists, the conclusion seems almost inevitable that they recognized the unique and vital role of this privilege in the system of separate powers.¹³⁸ Thus, the fact that other legislative privileges were curtailed gives no warrant to dilute the speech or debate privilege, which had been molded by history as vital to the independence and integrity of the legislature. The argument to the contrary, that the abuses of other privileges can be imputed to the speech or debate privilege, an argument expressed by Chief Justice Burger in *Brewster*, depends upon an historical construction that is more creative than descriptive.¹³⁹

The second event of importance in gauging the delegates' intent occurred during the brief debate in the Convention over the speech or debate clause. Madison proposed that the scope of the privilege be defined specifically, but this was rejected by the

¹³⁸ James Wilson, an important member of the committee that drafted the speech or debate clause, stated the purpose of this privilege in these terms:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

There is little doubt that in speaking of the "powerful," Wilson is referring primarily to the executive branch. Cf. *United States v. Johnson*, 383 U.S. 169, 181-82 (1966).

¹³⁹ *United States v. Brewster*, 408 U.S. 501, 516-21 (1972). In arguing for a limited construction of freedom of speech or debate, the Chief Justice stated:

The history of *the privilege* is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

Id. at 517 (emphasis added). He then cited WITKE, *supra* note 46, at 39, for examples of abuse. Yet all of these abuses, as well as the "curative legislation," dealt with the privilege from arrest, not the privilege of speech or debate. See WITKE, *supra* note 46, at 39-42. See also note 128 *supra*.

The Chief Justice then compounds the error by specifically referring to the privilege from arrest and emphasizing its limited scope. 408 U.S. at 520-21. He then states: "We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin." *Id.* at 521. No citation or authority is given for this remarkable proposition. The statement would have been substantially true in the 1400's, but totally ignores the completely separate development of the two privileges over the 500 years that followed. While the original formulation of both privileges protected burgesses only from interference by private persons with their parliamentary functions, see pp. 1122-23 & notes 46-48 *supra*, the speech or debate privilege developed into a shield against interference by the King. The freedom from arrest privilege, however, never applied to executive-motivated actions. See note 46 *supra*.

Earlier in his analysis, the Chief Justice combined both of these errors when he attempted to invoke the memory of the Framers: "The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards." *Id.* at 517. If the case under decision had involved a legislator invoking the privilege against arrest to

Convention.¹⁴⁰ Although there is no direct evidence of the reason behind the Convention's action, it may be inferred that the Framers were heeding Blackstone's warning that such definitions could be counterproductive, for if¹⁴¹

no privilege [were] to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament.

Madison himself was later to agree, advocating a functional approach to the privilege.¹⁴²

2. *Post-Convention Developments.* — The great ideals of the Constitution were not long in print before they were tested by intense factional disputes which threatened the Republic's future. Internecine conflict was mitigated by the unifying role of President Washington, but even limited tolerance gave way to undisguised suppression under the administration of John Adams.¹⁴³ The most forceful and persistent of the executive's critics were in the press and in Congress. And the Federalist administration enlisted the judiciary to intimidate both groups.¹⁴⁴

(a) *The Cabell Grand Jury Investigation and Jefferson's Protest.* — In 1797, a federal grand jury was impanelled in Virginia to investigate the conduct of several anti-Federalist members of Congress, including Congressman Cabell of Virginia, who had sent newsletters to their constituents attacking the administration's policy in the war with our former ally, France. The administration declared the newsletters to be "seditious," to contain information valuable to the enemy, and to threaten the security of

bar a civil suit for nonpayment of debt, this statement would be persuasive; all of the "history," "abuses" and "the privilege" discussed involve that privilege. If the delegates were aware of a long "history" of "abuses" from "too sweeping safeguards" of freedom of speech and debate, they certainly kept this to themselves. All of the available evidence, including Jefferson's great protest in *Cabell's Case*, note 150 *infra*, supports the conclusion opposite to that asserted by the Chief Justice. Compare his opinion in *Powell v. McCormack*, 395 F.2d 577, 599-602 (D.C. Cir. 1968), *aff'd in part, rev'd in part*, 395 U.S. 486 (1969), where the clause's history and purpose were set forth more accurately.

¹⁴⁰ See Cella, *supra* note 46, at 14-15.

¹⁴¹ I BLACKSTONE'S COMMENTARIES 164 (1765).

¹⁴²

In the application of the privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide.

4 WRITINGS OF JAMES MADISON 221 (1865).

¹⁴³ See J.M. SMITH, *FREEDOM'S FETTERS* (1956); Carroll, *Freedom of Speech and the Press in the Federalist Period: The Sedition Act*, 18 U. MICH. L. REV. 615 (1920).

¹⁴⁴ See SMITH, *supra* note 143; Carroll, *supra* note 143.

the nation.¹⁴⁵ The grand jury was placed under the supervision of Mr. Justice Iredell. Spurred by his inflammatory charge,¹⁴⁶ the grand jury levied indictments against Cabell and others for disseminating "unfounded calumnies" against the government.¹⁴⁷

Thomas Jefferson, who was then Vice-President of the United States and a leading contemporary expert on congressional procedure,¹⁴⁸ immediately drafted a long essay in the form of a protest to the Virginia House of Delegates, signed by himself and other leading citizens of the district represented by Cabell. Jefferson's treatise condemned the grand jury's investigation as an overt violation of the congressional privilege and of the doctrine of separation of powers. The draft was forwarded to Madison, who joined in supporting it and suggested minor changes.¹⁴⁹ These changes were then adopted by Jefferson and the protest was sent to the House of Delegates. The significance of this eloquent protest goes beyond even the stature of its authors; it is a cogent analysis of the purposes and scope of the speech or debate clause, as well as the limitations the clause places on grand jury investigations.¹⁵⁰ Jefferson's protest ended with a petition that the

¹⁴⁵ See 8 WORKS OF THOMAS JEFFERSON 325 (Ford ed. 1904).

¹⁴⁶ See I. BRANDT, JAMES MADISON: FATHER OF THE CONSTITUTION 460 (1950); M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 605 (1970).

¹⁴⁷ 8 WORKS OF THOMAS JEFFERSON 325 (Ford ed. 1904).

¹⁴⁸ While Vice-President, Jefferson compiled the authoritative Manual of Parliamentary Practice. This manual is controlling in the House of Representatives except when in conflict with a standing rule. See Rule XLII in L. DESCHLER, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 439, 91st Cong., 2d Sess., § 938, at 540 (1971).

¹⁴⁹ Letter from Madison to Jefferson, August 5, 1797, in PRESIDENTIAL PAPERS MICROFILM, JAMES MADISON PAPERS, SERIES I: 1796 JAN. 5 — 1801 JUNE 14 (Library of Congress).

¹⁵⁰ 8 WORKS OF THOMAS JEFFERSON 322-31 (Ford ed. 1904):

[I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

Id. at 322-23.

[F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with

House of Delegates order the arrest and imprisonment of the grand jurors¹⁵¹ for this "great crime, wicked in its purpose, and mortal in its consequences," which not only jeopardized Cabell personally, but infringed the rights of the people.¹⁵² The petition apparently mobilized public opinion, because the grand jury quickly withdrew its presentment.¹⁵³

(b) *Matthew Lyon's Case*. — Intimidation of critical members of Congress did not end with the aborted grand jury investigation of Congressman Cabell. In 1798, the administration obtained an even more potent weapon for use against its opponents — the Sedition Act.¹⁵⁴ As he had predicted,¹⁵⁵ Matthew Lyon, a vociferous anti-Federalist congressman from Vermont, was the first person prosecuted under the Act.¹⁵⁶ His trial, its effects on representative government, and the public reaction it generated, bore witness to the effects on the doctrine of separation of powers which result when the executive and judicial branches take action against a legislator who speaks out against policies thought by the executive to be "essential" to the national security.

their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods.

Id. at 325-27.

¹⁵¹ *Id.* at 329-30.

¹⁵² *Id.* at 331.

¹⁵³ See J.M. SMITH, *FREEDOM'S FETTERS* 95 (1956); Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WILLIAM AND MARY QUARTERLY 152-53 (third series 1948). That the protest was aimed principally at alerting public opinion seems evident from Madison's letter, in which he stated:

It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal courts; nor could a better occasion occur.

Letter from Madison to Jefferson, August 5, 1795, in *PRESIDENTIAL PAPERS MICROFILM*, JAMES MADISON PAPERS, SERIES I: 1796 JAN. 5-1801 JUNE 14 (Library of Congress).

¹⁵⁴ 1 Stat. 543 (July 14, 1798).

¹⁵⁵ *Lyon's Case*, 15 F. Cas. 1183, 1185 (No. 8646) (C.C.D. Vt. 1895) (the case was decided in 1798).

¹⁵⁶ *Id.* This case is also discussed in detail in SMITH, *supra* note 153, at 221-41, in a chapter aptly entitled *The Ordeal of a Critical Congressman*. Mr. Justice Patterson's role in the case is also discussed in Kraus, *William Patterson*, 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 163, 170-71 (L. Friedman & F. Israel eds. 1969).

Lyon was indicted and tried under the Sedition Act for publishing two letters: the first accused the President of an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" and the second reprinted a communication from France containing a charge of "stupidity" in the nation's policy toward France.¹⁵⁷ Supervising the grand jury was Mr. Justice Patterson, who instructed the jurors to look carefully at "the seditious attempts of disaffected persons to disturb the government."¹⁵⁸ The grand jury issued the indictment against Lyon on October 5, 1798,¹⁵⁹ 2 days after it was impanelled and at a time when Lyon was a candidate for reelection to a House equally divided between Federalists and anti-Federalists.¹⁶⁰

Lyon's trial began 4 days later. He was represented by the Chief Justice of Vermont, but the latter withdrew when Justice Patterson refused to allow the defense adequate time for preparation.¹⁶¹ Lyon was ignorant of the law and offered no real defense.¹⁶² Following one-sided instructions by Justice Patterson, the jury found Lyon guilty as charged.¹⁶³ He was sentenced to 4 months' imprisonment and fined \$1,000.

The lesson which the Administration sought to achieve in jailing Lyon was not unheeded; Jefferson wrote that "Lyon's judge, and jury . . . are objects of national fear."¹⁶⁴ But the Adams Administration's careful planning was upset when Lyon's constituents, enraged at the imprisonment of their representative for criticizing Adams, formed a mob and threatened to free him forcibly. Lyon apparently perceived the political leverage he now possessed, and quieted the mob. His continued imprisonment was so embarrassing "that the cabinet panted for an excuse to liberate him."¹⁶⁵ He was offered a pardon and money in return for an apology (the President said that "repentance must precede mercy"), but Lyon refused.¹⁶⁶ He was reelected while in jail by a comfortable majority and released from prison at the conclusion

¹⁵⁷ Lyon's Case, 15 F. Cas. 1183, 1184 (No. 8646) (C.C.D. Vt. 1895) (case decided in 1798).

¹⁵⁸ Kraus, *supra* note 156, at 170.

¹⁵⁹ *Id.*

¹⁶⁰ Lyon's Case, 15 F. Cas. 1183, 1187 (No. 8646) (C.C.D. Vt. 1895).

¹⁶¹ *Id.* at 1185.

¹⁶² *Id.* at 1187.

¹⁶³ Patterson charged the jury to decide two points: 1) whether Lyon authored the writings in question, and 2) whether he wrote them seditiously, with "bad intent." The first issue was not contested. Kraus, *supra* note 156, at 170-71. But Justice Patterson never mentioned the propriety of legitimate political opposition, the defense of truth, or even the possibility of acquittal. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Lyon's Case, 15 F. Cas. 1183, 1189 (No. 8646) (C.C.D. Vt. 1895).

¹⁶⁶ *Id.* at 1190.

of the sentence.¹⁶⁷ On his return trip to Congress, he was hailed by crowds rivaling those at Washington's inauguration.¹⁶⁸ A move by Federalist forces in the House to expel him failed to muster the necessary two-thirds vote, and Lyon served another 10 years.¹⁶⁹ Final vindication came in 1840, when a bill was passed by both houses and signed by the President voiding the judgment.¹⁷⁰

Acting in his own defense, Lyon had not raised article I, section 6 as a defense to his prosecution, and the issue of the speech or debate privilege was not litigated at his trial. But *Lyon's Case* is nonetheless vitally important to the doctrine of legislative privilege. Lyon is the only member of Congress in American history to be tried and convicted in the courts for openly criticizing national policy. His trial and its aftermath illustrate vividly the harm to separation of powers which the Framers sought to prevent by including the speech or debate clause in the Constitution.¹⁷¹

III. THE SCOPE OF THE PRIVILEGE

In defining the scope of the speech or debate privilege in "emerging cases," Madison wrote, "the reason and necessity of the privilege must be the guide."¹⁷² The historical development of the privilege in both England and America reveals a fundamental principle—that the speech or debate privilege arose dynamically to preserve the functional independence of the legislature. If it is to serve this purpose effectively, its content can-

¹⁶⁷ *Id.*

¹⁶⁸ SMITH, *supra* note 153, at 241.

¹⁶⁹ *Lyon's Case*, 15 F. Cas. 1183, 1190 (No. 8646) (C.C.D. Vt. 1895).

¹⁷⁰ *Id.* at 1191.

¹⁷¹ Other constitutional privileges have been implicated in cases in which they were not specifically litigated. The Supreme Court has observed that the trials of newsmen under the Sedition Act, 1 Stat. 596 (1798), "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Many of the newsmen in these cases served as their own counsel, as did Lyon, either by their own choice or because Federalist judges were generally hostile to defense counsel. Thus the constitutional provision was often not raised as a defense. See, e.g., the trials of Thomas Cooper in F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 659-79 (1849). See also the trial of John Freis for treason, *id.* at 610-41. When newsmen represented by counsel did attempt to raise the constitutional issue, they were often ordered to abandon the effort. See, e.g., the trial of James T. Callender, *id.* at 710-13. Considering the attitude of Mr. Justice Patterson in the *Lyon* case, p. 1143 & notes 158-63 *supra*, there can be little doubt that the claim of privilege would have been summarily dismissed had Lyon raised it.

¹⁷² 4 WRITINGS OF JAMES MADISON 221 (Hunt ed. 1910); see note 142 *supra*.

not be frozen by the role of the burgesses of five hundred years ago, or by the events leading to the execution of Charles I, or even by the conditions prevalent in 1787. Instead the clause must be shaped, as it has always been, by the contemporary functions of the legislature in a system of separation of powers.¹⁷³

The historical development of the privilege should also demonstrate that it is an over-simplification to assert that the only argument supporting a broad construction is based upon exaggerated fears of a runaway and tyrannical executive.¹⁷⁴ Any system of government based on separation of powers contains inherent friction, and clashes between the legislative and executive branches over their respective prerogatives are inevitable. It should be remembered that past threats to legislative independence have come, in the main, from executives who were unquestionably sincere in their beliefs but unable or unwilling to settle their differences with critical legislators in the political arena.¹⁷⁵ But even well-meaning

¹⁷³ See Cella, *supra* note 45, at 34. Chief Justice Burger diluted the importance of the English experience by pointing out that

the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.

United States v. Brewster, 408 U.S. 501, 508 (1972). He drew on a statement from United States v. Johnson, 383 U.S. 169 (1966), that the privilege "was the culmination of a long struggle for parliamentary supremacy." *Id.* at 178. But this view of the development of the privilege in England is mistaken. In its formative period—from 1540 through 1688—the privilege was asserted by Parliament as a necessary defense of its growing independence. During that period, Parliament was attempting to preserve and extend its functions in a system of balance of powers. Neither the claim nor the reality of Parliamentary supremacy was to come until much later.

¹⁷⁴ But see Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335 (1965).

¹⁷⁵ See pp. 1123–28, 1140–44 *supra*. The only clear exception was the prosecution of Sir William Williams by James II, whose despotic ambitions were nurtured by a zealous belief in the divine right of kings. 13 HOW. ST. TR. 1370 (1686–1688). Yet even in this instance, one should hesitate before regarding the King's opponents as unyielding defenders of liberty. After Sir William Williams was convicted, he turned full circle and swore loyalty to the King. Williams, who had already been driven close to bankruptcy by the judgment in his criminal action, was sued by the Earl of Peterborough, who had been unfavorably mentioned in Dangerfield's Narrative and who demanded large damages from Williams. The King and Williams then struck a bargain whereby the civil action would be dropped if Williams became Solicitor General. To writers who lacked charity for former Whigs who aided the opposition, such a deal "to a man of strong principles . . . would have been more dreadful than beggary, imprisonment, or death." 2 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 988–89 (C. Firth ed. 1968).

As Solicitor General, Williams, a prior enemy and victim of James' oppressive policies, represented the King in the prosecution of the seven bishops. See pp. 1134–35 & notes 108–119 *supra*; Case of the Seven Bishops, 12 HOW. ST. TR. 183, 202 (1688). Not only did Williams argue that the King had the inherent power to

executive challenges to legislative activities can have a serious impact upon traditional legislative functions. When one considers that the cases involving the privilege have often subsumed such legitimate disputes between the executive and the legislature over their respective prerogatives, the prophylactic purposes of the doctrine of legislative privilege are magnified.

These considerations indicate that in executive-motivated suits, any contemporary legislative practice which is necessary to fulfill one of the goals of representative government should fall within the ambit of the speech or debate clause. In considering whether a given practice is protected by the clause, guidance is available in the actual workings of Congress to determine whether it is widely utilized by members in the performance of their duties. But the ultimate focus must be the functioning of the legislature according to the doctrine of separation of powers, so that the privilege, which is an historical derivative of that doctrine, will continue to be defined by it. Of course this does not mean that the privilege should extend to all of a congressman's actions simply because of his status. For example, crimes such as assault and battery or armed robbery should be beyond the scope of the privilege, even if fortuitously committed within the walls of the Capitol.¹⁷⁶ Such crimes are not legislative functions, and their commission in no way supports the system of separate powers.

A broad construction of the privilege in cases involving conflicts between the executive and legislators is also necessitated by considerations of judicial independence. Courts do violence to a democratic separation of powers when they legitimize executive

suspend ecclesiastical laws without the consent of Parliament, *id.* at 402-17, but he also cited his own conviction as precedent against some of the bishops' legal arguments. *Id.* at 226-29. To complete this surprising role reversal, the bishops were represented by Sir Robert Sawyer, who was the Attorney General who had prosecuted Williams. *Id.* at 202-03.

Following the Restoration, Williams disavowed the positions he had taken as Solicitor General in the *Seven Bishops* case. He opposed publication of the trial transcript, *id.* at 201, and in a later case, when discussing the *Seven Bishops* case, said to the King's Bench: 'I will not undertake to justify the proceedings of the late Government: we have all done amiss, and must wink at one another.' *Prynn's Case*, 87 Eng. Rep. 764, 766 (1691).

¹⁷⁶ Special problems are presented in prosecutions of crimes such as bribery, in which the charge is often intertwined with a privileged act. Since the speech or debate clause precludes inquiry into a congressman's "legislative acts . . . [and] his motives for performing them," the privilege might operate to bar the admissibility of evidence. *United States v. Johnson*, 383 U.S. 169, 185 (1966). See also *Ex parte Wason*, L.R. 4 Q.B. 573 (1869). In this sense, the speech and debate privilege operates testimonially—to prevent questioning of legislators concerning their activities—in a manner akin to the privilege against self-incrimination or the attorney-client privilege. See REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS 9 (House of Commons 1939). This is discussed more fully at pp. 1157-63 *infra*.

assaults upon legislative prerogatives. If the courts define the privilege narrowly, so as to entertain on the merits executive-motivated challenges to legislative activities, they will subject themselves to weighty pressures which threaten to politicize their processes. Such pressures have too often proved irresistible in the past. Whether couched in terms of "sedition," "treason," or "espionage," the essential position of the executive in these cases has been that legislators have jeopardized policies which the executive believes are essential to the furtherance of important national interests. Understandably, the traditional inclination of the courts has been to entertain the executive's claims of impending disaster with a sympathetic ear, and to view the actions (and sometimes motives) of the offending legislators as irresponsible or unpatriotic, or both.¹⁷⁷ But neither Congress nor the English Parliament has been full "of spies and traitors,"¹⁷⁸ and judicial decisions restricting the privilege at the behest of the executive have later been regretted as unfortunate instances of judicial overreaction.¹⁷⁹ Judi-

¹⁷⁷ See notes 65 & 102 *supra* for the perspectives of Justices of the King's Bench in Eliot's and Williams' cases, and pp. 1140-43 *supra* for those of two American Justices in Cabell's and Lyon's cases. See also *Gravel v. United States*, 408 U.S. 606 (1972), in which Justice Douglas, in dissent, pointedly stated that judicial hostility "emanates from every phase of the present proceeding." *Id.* at 633.

¹⁷⁸ In 1938, an opposition member of the House of Commons, Duncan Sandys, obtained and disclosed secret military documents, allegedly in violation of the Official Secrets Act, 10 & 11 Geo. 5, c. 75 (1920). The documents revealed the inadequacy of anti-aircraft defenses around London, and Sandys hoped to mobilize public opinion to remedy the situation. A military court of inquiry subpoenaed Sandys for interrogation about the source of the documents. The House appointed a special committee to consider the applicability of the Official Secrets Act to members of Parliament. During the course of debate, Clement Atlee stated:

Unless Members of Parliament can have reasonable access to knowledge they cannot criticise Ministers effectively. It is our duty to criticise Ministers who are in charge of the administration

In practice Members of Parliament do not abuse their privileges; we are not a House of spies and traitors, and the House has its own method of dealing with hon. Members and of keeping them within bounds. I think it is essential for the life of this House that this House itself should make itself responsible for hon. Members. There is a danger in any suggestion that there should be some outside court or sanction brought in.

337 PARL. DEB. H.C. (5th Ser.) 2167 (1938). The Committee agreed with Atlee on this point. See REPORT FROM THE SELECT COMMITTEE ON THE JUDICIAL SECRETS ACTS 15 (House of Commons 1939). But see note 212 *supra*.

¹⁷⁹ In *Rex v. Wright*, 101 Eng. Rep. 1396, 1398 (1799), one Justice of the King's Bench said of the *Williams* case that it "happened in the worst of times" and another said that it was "a disgrace to the country." The same may properly be said of the actions of Justices Iredell and Patterson in the *Cabell* and *Lyon* cases. See pp. 1140-43 *supra*.

The phenomenon of judicial over-deference to executive claims of protecting national interests is not, of course, limited to legislative immunity cases. It has occurred with some frequency in first amendment cases as well. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

cial neutrality can be assured only by a broad definition of the privilege, which leaves judgments about the propriety of specific exercises of legislative functions in the political arena. Which legislators are heroes in their conflicts with the executive, and which are villains, is a matter best left to the collective deliberation of their colleagues and of their constituents.

These considerations have little applicability in private civil cases. None of the cases which led to the incorporation of the privilege in our Constitution involved a suit by a private individual claiming that his rights were violated.¹⁸⁰ Although the early judicial origins of the privilege certainly would have barred such suits,¹⁸¹ only under the static historical view would that result necessarily persist. But the functional approach which derives from our historical analysis suggests that the operation of the clause should be different in cases where it is asserted against individual rights than in those where it is asserted against executive intrusions.¹⁸² For reasons which will be developed more fully,¹⁸³ the proper functioning of our system of separation of powers requires that in at least one instance involving a clash of individual rights and the privilege — where rights guaranteed by the Constitution are infringed — judicial review should not be foreclosed by the speech or debate clause.

In this section of the Article, we analyze the contemporary role of Congress to determine which congressional activities should be defined as "legislative functions" for the purpose of the speech or debate clause. We examine the question whether collective congressional action can divest individual congressmen of the privilege, and we attempt to distinguish between executive-motivated and civil suits against legislators.

A. The Informing Function

A major issue in the *Gravel* case was whether the acquisition of the Pentagon Papers and the Senator's private publication of the committee record were beyond judicial inquiry. Adopting a

¹⁸⁰ There were, in fact, no civil suits against members of Parliament involving the speech or debate privilege before our Constitution was written. *But cf. Strode's Case*, *supra* note 47 (private criminal case in 1512 involving privilege when still tied to judicial origins). This is probably the result of two factors: (a) private litigants may have felt that bringing such actions was useless; and (b) they may have been deterred by the existence of another privilege, by which the House of Commons committed for contempt those individuals who had insulted members. *See WITTKE, supra* note 46, at 49-51.

¹⁸¹ See the discussion of *Strode's Case*, *supra* note 47. *See also Ex parte Wason*, L.R. 4 Q.B. 573 (1869).

¹⁸² *See* pp. 1172-74 *infra*.

¹⁸³ *See* pp. 1174-77 *infra*.

narrow definition of the scope of the privilege and asserting that these matters were not part of "legislative activity," the Supreme Court held that they were not privileged.¹⁸⁴ Specifically, the Court held that while a Senator cannot be questioned about his conduct in committee, he can be interrogated about how he obtained materials for the hearing and how he secured publication of the committee record. In so holding, the Court adopted an inadequate definition of "legislative activity," which allowed executive and judicial inquiry in precisely that kind of situation which the speech or debate clause was designed to forbid.

1. *Publication of Legislative Proceedings.* — The scheme of representative government envisaged by the Constitution presupposes an obligation on the part of a legislator to inform his constituents and colleagues about vital matters concerning the administration of government and national affairs.¹⁸⁵ The informing function plays a key role in our system of separation of powers, insuring that the administration of public policy by the innumerable nonelected officials of the executive department is fully understood by the legislature and the people.¹⁸⁶ In contemporary times, as much as when the Constitution was written, the informing function acts to preserve the basic character of our constitutional government.¹⁸⁷ For a system of self-government to be viable, the people must be fully informed of the workings of their government so that they may meaningfully exercise their rights to vote and to "free public discussion of the stewardship of public officials."¹⁸⁸ Congressmen should thus be unhindered in performing their duty of informing the electorate.¹⁸⁹

The publication of congressional committee proceedings and their dissemination to the electorate play other important roles in

¹⁸⁴ *Gravel v. United States*, 408 U.S. 606 (1972). The Court had held, in *United States v. Brewster*, 408 U.S. 501 (1972), that the Senator's activities were not "legislative," but were merely "political." *Id.* at 512. *But see* pp. 1150-53 *infra*.

¹⁸⁵ This was recognized by the Supreme Court in *Watkins v. United States*, 354 U.S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* at 200 n.33.

¹⁸⁶ *See, e.g.*, W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885).

¹⁸⁷ The centrality of the informing function to democratic institutions has been emphasized even by those political theorists who, while doubting the capacity of legislative bodies to legislate, nonetheless believed that by overseeing the administration of government they would make an essential contribution to the protection of liberty. *See, e.g.*, J.S. MILL, CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT 42 (People's ed. 1873).

¹⁸⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

¹⁸⁹ WILSON, *supra* note 186, at 303.

representative government. The heart of representative democracy is the communicative process between the people and their agents in government.¹⁹⁰ By making accurate reports of these proceedings widely available, congressmen enlighten the electorate and at the same time insure that the people will inform them and their colleagues of their well-considered views on pending or potential legislation. Practically every careful student of Congress has observed this process and has also noted that committee hearings and the publication and distribution of speeches and committee reports form the principal avenue for achieving it.¹⁹¹

In examining whether informing constituents through publication is a "legislative act," it is also pertinent to note that congressmen understand both the utility and necessity of holding committee hearings and publishing their proceedings in order both to enlighten the electorate and affect future legislation.¹⁹² Accordingly, Congress has provided a variety of financial and other supports for communications between a legislator and the public.¹⁹³ One study revealed that a majority of congressmen send newsletters to the public on a periodic basis,¹⁹⁴ and it has also been

¹⁹⁰ See, e.g., *SELECTED POLITICAL ESSAYS OF JAMES WILSON 169-70* (Adams ed. 1930).

¹⁹¹ See, e.g., J. BIBBY & R. DAVIDSON, *ON CAPITOL HILL 13* (1967); E.S. GRIFFITH, *CONGRESS: ITS CONTEMPORARY ROLE* 249-53 (4th ed. 1967); J.P. HARRIS, *CONGRESS AND THE LEGISLATIVE PROCESS* 41 (1967); *THE REORGANIZATION OF CONGRESS, A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASS'N* 13-14 (1945). See also H. LASKI, *THE AMERICAN PRESIDENCY: AN INTERPRETATION* 158 (1940). Cf. C.L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* 100-01 (1963).

¹⁹² See, e.g., CLAPP, *supra* note 191, at 265-66; W. MORROW, *CONGRESSIONAL COMMITTEES* 91-97 (1969); O. TACHERON & M. UDALL, *THE JOB OF A CONGRESSMAN* 117, 280-88 (1966).

¹⁹³

Such provisions include the franking privilege for sending letters, the telephone and telegraph allowance, the stationery allotments, use of the Joint Senate-House Radio-Television facilities, free distribution of the *Congressional Record*, favorable prices on personal reprints from the *Record*, and free use of the folding rooms which collate, fold, stuff, package and mail Congressional newsletters, polls and other communications directed to constituents.

C. HAWVER, *THE CONGRESSMAN'S CONCEPTION OF HIS ROLE*, 54-55 (1963). See also *Gravel v. United States*, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting); CLAPP, *supra* note 191, at 58-60, 89.

¹⁹⁴

In 1962 a confidential House survey showed that 231 of 437 members of the House used franked-mail newsletters, mailed weekly or on another periodic basis. Of the 231, some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year while 19 sent out 300,000 to 400,000 pieces. . . . In the middle range, well scattered between 5,000 and 300,000 pieces, were 168 (about 73%), while only 29 sent out 5,000 pieces or less.

HAWVER, *supra* note 193, at 56. The Post Office has reported that the amount of franked mail increased from 44.9 million pieces in 1955 to 63.4 million in 1958 and 111 million in 1962. CLAPP, *supra* note 191, at 59.

found that congressmen spend a substantial portion of their time informing the electorate.¹⁹⁵

The informing function is a fact of life in the modern Congress, and it surely cannot be dismissed cynically as a mere device for congressmen to woo votes.¹⁹⁶ Many congressional hearings have been held and extensively publicized in order to enlighten the electorate about activities which were inimical to the general welfare, and have resulted in public pressure for the consequent passage of important legislation. A small sample might include the famous inquiries conducted by the Kefauver committees on organized crime and on dangerous drug practices,¹⁹⁷ by the Senate rackets subcommittee on the regulation of internal operation of labor unions,¹⁹⁸ by the LaFollette civil liberties committee,¹⁹⁹ by the 1965 Senate committee hearings on automobile safety,²⁰⁰ and by the Fulbright committee on the Reconstruction Finance Corporation.²⁰¹ With respect to investigations of executive conduct, one

¹⁹⁵ See, e.g., the results of congressional surveys in TACHERON & UDALL, *supra* note 192, at 280-88.

¹⁹⁶ But see *United States v. Brewster*, 408 U.S. 501 (1972), where the Court did just that. Chief Justice Burger distinguished "legislative" from "political" activities of congressmen. The latter, termed "legitimate 'errands' performed for constituents," were said to include

making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside Congress. . . . They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections.

Id. at 512. Senator Ervin has stated that these comments show a basic lack of respect for a coordinate branch of government and amount to a "serious affront." Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 118 CONG. REC. S 13,610, 13,612 (daily ed. Aug. 16, 1972).

¹⁹⁷ *Hearings on Investigation of Organized Crime in Interstate Commerce Before the Senate Special Comm. to Investigate Organized Crime in Interstate Commerce*, 81st Cong., 2d Sess. (1950) & 82d Cong., 1st Sess. (1951).

¹⁹⁸ *Hearings on Violation or Nonenforcement of Government Laws and Regulations in the Labor Union Field Before the Permanent Subcomm. on Investigations of the Senate Government Operations Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on the Investigation of Improper Activities in the Labor or Management Field Before the Senate Select Comm. on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. (1957) through 86th Cong., 1st Sess. (1959).

¹⁹⁹ *Hearings on Violations of Free Speech and Assembly and Interference with Rights of Labor Before a Subcomm. of the Senate Comm. on Education and Labor*, 74th Cong., 2d Sess. (1936) through 76th Cong., 1st Sess. (1939).

²⁰⁰ *Hearing on Federal Role in Traffic Safety: Examination and Review of Efficiency, Economy, and Co-ordination of Public and Private Agencies, Activities and the Role of the Federal Government Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 89th Cong., 1st Sess. (1965).

²⁰¹ *Hearings on a Study of the Operations of the Reconstruction Finance Corporation Pursuant to S. Res 219 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. (1950) & 82d Cong. 1st Sess. (1951).

might add the Wheeler-Walsh exposure of scandal in the Harding administration,²⁰² the Truman-Mead hearings on national defense²⁰³ and of course, many more recent hearings on the origins and conduct of the Vietnam War.²⁰⁴

The constitutional evil which would result from denying the privilege's applicability to the informing function of Congress should be apparent, particularly when this is done at the behest of the executive and with respect to material which is critical of executive behavior. If the executive branch may institute grand jury proceedings and interrogate witnesses about the publication of their speeches and committee reports which congressmen send to the electorate, legislators will inescapably be inhibited from communicating to constituents—in press releases, newsletters, and anything spoken outside of Congress. Fear of harassment, grand jury investigations, and even prosecutions will isolate congressmen from their constituents,²⁰⁵ thus undermining an important legislative function.

²⁰² See Frankfurter, *Hands off the Investigations*, 38 THE NEW REPUBLIC 329-31 (1924).

²⁰³ *Hearings on Investigation of the Nation's Defense Program Before a Senate Special Comm. Investigating the National Defense Program*, 77th Cong., 1st Sess. (1941) through 80th Cong., 1st Sess. (1947).

²⁰⁴ See THE VIETNAM HEARINGS (1966) (copyright and intro. by J.W. Fulbright); THE TRUTH ABOUT VIETNAM: REPORT ON THE UNITED STATES SENATE HEARINGS (F. Robinson & E. Kemp eds. 1966) (analysis by W. Morse; foreword by J. W. Fulbright). On the general importance of congressional hearings, see Black, *Inside a Senate Investigation*, 172 HARPER'S MONTHLY 275, 285-86 (1936).

²⁰⁵ The holding in *Gravel* arguably does not undermine a congressman's obligation to inform his colleagues, since the specific holding is limited to "private" publication and not to congressionally authorized publications, which would include the *Congressional Record*. See *Gravel v. United States*, 408 U.S. 606, 626 & n.16 (1972). But the logic of the Court's holding may lead to the conclusion that even statements inserted in the *Record* are not privileged, since publication of proceedings in the *Record* may serve to inform constituents no less than Senator Gravel's publication of the subcommittee record, and the Senator's action arguably also served to inform congressional colleagues no less than the *Record*. And logically, official authorization to "republish" should not affect the scope of the privilege. See pp. 1166-69 *infra*. But even if the privilege is held to apply to the *Record*, its publication does not obviate the effect of the decision in cutting off congressmen from their constituents. The *Record* has a very limited circulation, and most congressmen necessarily rely upon "private" publications and speeches outside the Capitol to inform their constituents. See pp. 1150-51 & notes 192-95 *supra*; p. 1168 & note 274 *infra*. Furthermore, congressmen do not enjoy an unlimited right to insert matters into the *Record*; a congressman must obtain the unanimous consent of his house in order to place a statement in the *Record*. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. On April 25, 1972, Senator Gravel asked for unanimous consent to insert into the *Record* a copy of National Security Study Memorandum No. 1, which contained analyses by the Defense Department, the State Department and the Central Intelligence Agency concerning the feasibility and likely consequences of an executive decision

The conflict over the informing function which was raised in the *Gravel* case is certainly not novel. Past disputes over the scope of legislative privilege have also centered on this very issue; the factual similarity of the *Gravel* case with the precedents of congressmen Cabell²⁰⁶ and Lyon²⁰⁷ in this country and Sir William Williams²⁰⁸ in England is readily apparent. All involved attempts by legislators to inform their constituents of corruption or maladministration in the executive branch. The central purpose of the speech or debate privilege — to protect legislative functions in the system of separate powers — requires that attempts by the executive to stifle such communication between the people and their representatives in Congress should not be entertained in the courts; the contrary result, to quote Jefferson, would be “to leave us, indeed, the shadow, but to take away the substance of representation.”²⁰⁹

2. *Acquisition of Information.* — The same considerations which dictate that publications of legislative proceedings should be privileged, should apply in equal or even greater force to the acquisition of information for use in legislative proceedings. In order to propose legislation, debate and vote intelligently, and inform the people about the workings of government, congressmen must first be able to inform themselves.²¹⁰ There are two primary

to bomb Hanoi and Haiphong and to mine the North Vietnamese harbors. Senator Griffin (R. Mich.) objected, 118 CONG. REC. S 6579-81 (daily ed. April 25, 1972), and it was decided to resolve the matter in an executive session of the Senate. The session, held on May 2, 1972, lasted for 6½ hours, and it was ultimately decided, informally, that Senator Gravel would not place the memorandum in the *Record* and that a specially appointed committee would give the matter further study. The proceedings of the executive session were subsequently published in 118 CONG. REC. 7393-7427 (daily ed. May 5, 1972).

²⁰⁶ See pp. 1140-42 & notes 145-53 *supra*.

²⁰⁷ See pp. 1142-44 & notes 154-70 *supra*.

²⁰⁸ See pp. 1129-33 & notes 74-107 *supra*.

²⁰⁹ 8 WORKS OF THOMAS JEFFERSON 326 (Ford ed. 1904). See note 150 *supra*.

²¹⁰ As Dean Landis has emphasized:

It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose. Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory.

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40

methods for doing so. Legislators can subpoena witnesses, a method held to be a privileged "legislative act" in *Dombrowski v. Eastland*.²¹¹ And legislators can also receive information from informal, voluntary sources. These sources not only provide direct information to congressmen, but often make possible the receipt of information through subpoenas. A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.²¹²

It is especially important that acquisition of information be privileged when the subject of congressional inquiry is executive decisionmaking and when executive errors and misjudgments are more apt to be hidden. As Mr. Justice Brennan observed: "Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds."²¹³ The informal sources of information from leaks and volunteers are particularly vital in view of the security classification system and the growing assertion of "executive privilege," by which the executive may refuse to supply Congress information which is crucial to its decisionmaking.²¹⁴ The necessity for obtaining information from the executive also influences the allocation of power among the branches of government. If the executive can cut Congress off from relevant sources of information, it can expand its powers into areas vested by the Constitution in the

HARV. L. REV. 153, 205-06 (1926). See also *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927).

The primary reason for the development and reliance upon committees in each house was to further congressional self-education. See generally W.L. MORROW, CONGRESSIONAL COMMITTEES (1969); Landis, *supra*. See also note 178 *supra*. Furthermore, when the Court held in *Tenney v. Brandhove*, 341 U.S. 367, 377 & n.6 (1951), that committee deliberations are privileged, it appeared to rely on the necessity of Congress' ability to inform itself.

²¹¹ 387 U.S. 82 (1967). A complaint against Senator Eastland for allegedly subpoenaing documents in violation of the fourth amendment was dismissed on the basis of his speech or debate privilege.

²¹² This was the conclusion reached by Sir Gilbert Campion, the legal expert for the House of Commons select committee which was appointed in response to the Duncan Sandys incident, see note 178 *supra*. REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS (1939). However, the committee itself stated, without explanation, that the receipt of information by a Member of Parliament was not privileged. *Id.* at 11. One can speculate about the extent to which the committee was influenced by the outbreak of World War II shortly before its report was issued.

²¹³ *Gravel v. United States*, 408 U.S. 606, 663 (1972) (Brennan, J., dissenting).

²¹⁴ See, e.g., *id.* at 637-46 (Douglas, J., dissenting).

legislative branch. There can perhaps be no better example of such potential usurpation of functions, and of the attendant disastrous results, than the history of the American involvement in the Indochina War. It is ironic that perhaps the most important revelation of the Pentagon Papers was the ease with which the executive was consistently able to manipulate a Congress kept ignorant of pertinent but distasteful information.²¹⁵

Yet in *Gravel* the Supreme Court held sua sponte²¹⁶ that Senator Gravel's receipt of the Pentagon Papers was not immune from extra-legislative inquiry. In discussing the scope of the protective order issued by the court of appeals, the majority said, almost in passing:²¹⁷

Neither do we perceive any constitutional . . . privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.

This statement is not at all clear. On its face, the Court did not specifically hold that acquisition was not a "legislative act," but that inference is inevitable.²¹⁸ For if acquisition is a legislative act, then any questioning about it perforce will "implicate" privileged conduct.

²¹⁵ See also NO MORE VIETNAMS? THE WAR AND THE FUTURE OF AMERICAN FOREIGN POLICY (Pfeffer ed. 1968).

²¹⁶ Since the court of appeals had held that Senator Gravel's acquisition of the Pentagon Papers was privileged, see *United States v. Doe*, 455 F.2d 753, 758-59 (1st Cir. 1972), and since the Solicitor General did not seek review of this ruling in his petition for certiorari, the issue was not discussed in the briefs. *United States' Petition for Certiorari* at 2, *Gravel v. United States*, 408 U.S. 606 (1972). During oral argument, in response to questions from Mr. Justice Marshall, the Solicitor General conceded the correctness of the lower court's ruling. See *Gravel v. United States*, 408 U.S. 606, 632 n.4 (1972) (Stewart, J., dissenting).

²¹⁷ 408 U.S. at 628-29.

²¹⁸ But see *Dowdy v. United States*, No. 72-1614 (4th Cir., March 12, 1973), where the court read *Gravel* as immunizing the "gathering [of] information in preparation for a possible subcommittee investigatory hearing." *Id.* at 27. According to the *Dowdy* court, the *Gravel* decision merely articulated two exceptions to the immunity: (a) "if [inquiry] proves relevant to investigating possible third party crime," and (b) if the congressman's act is itself criminal. *Id.* at 28 n.20, citing *Gravel v. United States*, 408 U.S. 606, 629 (1972). But the purpose of the privilege is inconsistent with the existence of such "exceptions." As the *Dowdy* court itself said, once it is determined that a legislative function is "apparently being performed, the propriety and motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry." *Dowdy v. United States*, *supra* at 33. Ad hoc inquiry into whether a specific exception is factually present negates the concept of privilege, particularly when, as here, the exceptions are so broad as to swallow the privilege.

The principle articulated in the *Gravel* opinion was that the privilege extends to matters beyond pure speech or debate "only when necessary to prevent indirect impairment of [congressional] deliberations."²¹⁹ We believe this standard is far too narrow if it excludes from the ambit of the privilege practices such as the publication of legislative activities which serve to enlighten the electorate. Arguably, the standard does protect the informing function, since an informed public is vital to effective congressional deliberations,²²⁰ and curtailment of the informing function would at least indirectly impair such deliberations. But acquisition certainly should be privileged under the Court's standard. Acquisition of information by congressmen and committees is essential to intelligent deliberation on important issues by Congress. "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."²²¹ Indeed the court of appeals, from which the Supreme Court adopted its purported standard as to the scope of the clause, had little difficulty in concluding that Senator Gravel could not be questioned about his acquisition of the Pentagon Papers.²²² It is thus apparent either that the actual standard applied by the Court is narrower than the one stated in the opinion or that the articulated standard was applied in little more than a result-minded manner.

It is possible, however, that the Court's summary disposition of the acquisition issue in *Gravel* was seen by the majority as being dictated, a fortiori, by that same majority's rejection — in *Branzburg v. Hayes*²²³ — of the claim of newspapermen of the right to preserve the confidentiality of sources. But for several reasons, that decision is not dispositive of a congressman's claim that the speech or debate clause encompasses acquisition of information. First, the claim of congressional privilege rests upon a different basis than the claim of privilege for the press — the latter is premised entirely upon the assertion that permitting the interrogation of newspapermen about information given to them by confidential sources will dry up those sources and thereby diminish the amount of information available to the public. The reporter's claim of privilege is thus entirely derived from the rights of the people to be informed. While congressmen do serve the function of enlightening the public by disseminating information,

²¹⁹ 408 U.S. at 625, quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972).

²²⁰ See pp. 1149-50 & notes 190-91 *supra*.

²²¹ Landis, *supra* note 210, at 209.

²²² *United States v. Doe*, 455 F.2d 753, 758-59 (1st Cir. 1972).

²²³ 408 U.S. 665 (1972). This decision was handed down the same day as *Gravel*; Mr. Justice White wrote both majority opinions.

they must also obtain information for use in formulating laws. Thus, if key sources of confidential information are chilled, the very functioning of Congress itself is jeopardized. Second, the Supreme Court majority in *Branzburg* expressed fear that the privilege being asserted was incapable of limitation — that is, it would be impossible to determine who was or was not a bona fide newsman; and lurking in the background were other groups, including scholars and authors, seeking similar protection.²²⁴ In contrast, congressmen comprise a relatively small, well-defined group, which is singled out for unique protection by the speech or debate clause. Third, as we have emphasized, the claim of confidentiality by congressmen is especially compelling in their acquisition of information concerning the executive branch, and this raises important considerations of separation of powers not so directly encountered in the newsman's situation.²²⁵

B. The Bribed Congressman — Inquiry into Motives for Speeches and Votes

Former Senator Brewster was indicted under federal bribery and conflict-of-interest statutes which are specifically applicable to members of Congress.²²⁶ The five counts of the indictment charged Brewster with soliciting and receiving sums of money in return for "official acts performed by him in respect to his action, vote and decision" on proposed postal rate legislation.²²⁷

²²⁴ *Id.* at 703-05. For a lower court decision rejecting a scholar's claim that he had a right under the first amendment to protect the confidentiality of his sources, see *United States v. Doe*, 332 F. Supp. 938 (D. Mass. 1971).

²²⁵ A fourth distinction derives from the different tests applied in first amendment and privilege cases. The absolutist approach of Justices Black and Douglas in first amendment cases — that privileged speech will not yield to subordinate governmental interests — has never commanded a majority of the court. The majority in *Branzburg* recognized that news gathering was entitled to some first amendment protection but held that this was outweighed by the government's interest in securing information relevant to alleged crimes. *Branzburg v. Hayes*, 408 U.S. 665, 681-82, 686-88 (1972). The speech or debate privilege, on the other hand, has always been considered to afford "an absolute privilege . . . in respect to any speech, debate, vote, report or action done in session." *Barr v. Matteo*, 360 U.S. 564, 569 (1959). See also *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930). Thus, a determination that acquisition was protected by the speech or debate clause would mean that executive appeals for more effective criminal law enforcement could not be entertained.

²²⁶ 18 U.S.C. § 201(a), (c)(1)-(2), (g) (1970).

²²⁷ *United States v. Brewster*, 408 U.S. 501, 502-04 (1972). Senator Brewster was charged in five counts of a ten count indictment. Four of the counts charged him with violation of 18 U.S.C. § 201(c)(1)-(2) (1970), which provides:

Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts,

It is apparent that accepting a bribe is not a legislative act; it could not seriously be contended that such an activity is necessary to further any legitimate goal of representative government. On the contrary, bribe taking seriously subverts the legislative process. It might therefore appear that the "bribed congressman" situation in the *Brewster* case presents completely different considerations than the "informing congressman" situation in the *Gravel* case.

However, speech or debate clause problems arise when the alleged bribery is intertwined, as in *Brewster*, with the performance of a privileged act.²²⁸ In *United States v. Johnson*,²²⁹ Mr. Justice Harlan stated that the essence of such a charge is simply that privileged activity was corruptly motivated; and the Court held that such motivation could not be made "the basis of a criminal charge against a member of Congress."²³⁰ In reaching this conclusion, Justice Harlan laid great stress upon the prophylactic purposes of the clause, emphasizing that it should be construed broadly in order "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."²³¹ The thrust of this argument seems to be that executive and judicial inquiry into a congressman's motivation puts him at the mercy of the other branches, and there is no guarantee that their definition of evil will not encompass the vociferous opponent as well as the bribed congressman.²³²

At least on its face, this argument is not fully satisfactory. A

receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States . . .

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(d)-(e) (1970). A fifth count of the indictment charged Senator Brewster with violating 18 U.S.C. § 201(g), which prohibits public officials from accepting payment in return for performance of an official act. 18 U.S.C. § 201(a) specifically defines "public official" to include a member of Congress.

²²⁸ If a congressman is indicted for accepting a bribe to commit a nonlegislative act (e.g., intervening before an executive agency, *see* pp. 1163-64 *infra*), no problem of privilege exists.

²²⁹ 383 U.S. 169 (1966).

²³⁰ *Id.* at 180.

²³¹ *Id.* at 181-82.

²³²

In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

Tenny v. Brandhove, 341 U.S. 367, 378 (1951) (footnote omitted).

major objective of the privilege is to give practical security to legislators who criticize executive administration of domestic and foreign policy. Unlike investigations concerning the publication and acquisition of information,²³³ a bribery prosecution does not normally involve disputes between the branches over the effective scope of their respective functions. Nor may it be sufficient to speculate that an ill-willed executive will selectively employ bribery prosecutions against outspoken legislative critics who are constitutionally immune from more direct threats. If the executive wishes to harass a congressman, it has many other means available, including use of the grand jury and an arsenal of law enforcement and investigatory agencies.²³⁴ Since the ability of the executive to harass and prosecute congressmen for activities unrelated to the legislative process has not evoked fears of widespread executive intimidation, the independence or integrity of Congress would hardly appear to be jeopardized if the "bribed congressman" does not enjoy immunity from prosecution.²³⁵

However, the threat to legislative independence becomes clearer when the focus is shifted to an examination of the problems inherent in the administration of bribery statutes. When

²³³ See pp. 1150-55 *supra*.

²³⁴ The grand jury's attempted investigation of Senator Gravel's activities illustrates such potential harassment of a critical legislator. Counsel for the Internal Security Division suggested before the district court that Senator Gravel himself could be subpoenaed, at which time he could invoke his fifth amendment privilege against self-incrimination. Record at 8, *Gravel v. United States*, 408 U.S. 606 (1972). Only after the district court issued its protective order did the Justice Department for the first time state that an indictment against Senator Gravel was "not probable." *Id.* at 127-28. Throughout the proceedings, the Justice Department offered no reason for the grand jury investigation. One instance in the Supreme Court proceedings is suggestive of the use of the investigation for harassment. Certiorari was granted on February 22, 1972, *Gravel v. United States*, 405 U.S. 916 (1972), which was too late, under the usual time limits for filing briefs, for oral argument during that term. The Solicitor General filed a motion to expedite consideration, claiming that the grand jury was being paralyzed by the stay and that "important evidence" relating to the Ellsberg trial, see note 12 *supra*, might somehow be withheld if Rodberg's testimony could not be obtained. The latter assertion was directly contrary to the Justice Department's assertion before the First Circuit that it was not using the Boston grand jury to gather more evidence against Ellsberg, who had already been indicted in Los Angeles. See *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972).

In any event, the Supreme Court granted the motion to expedite, *Gravel v. United States*, 405 U.S. 972 (1972), and a decision favoring the Justice Department was rendered on June 29, 1972. *Gravel v. United States*, 408 U.S. 606 (1972). Having thus proved its point, the Justice Department declined to send new grand jury subpoenas to Rodberg, Webber, Stair or anyone else connected with Gravel. See note 20 *supra*.

²³⁵ See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *YALE L.J.* 335, 348 (1965).

members of the executive and judicial branches accept money from private interests and then support those interests, a strong inference of unethical and illegal conduct arises. But because of their unique representative status, the same cannot be said of congressmen. Members of Congress owe a certain amount of loyalty to their constituents; at the same time, they rely upon gifts in the form of campaign contributions to finance the constantly escalating costs of travel expenses and political campaigns. Forced to satisfy their own needs as well as to serve the interests of their constituents, congressmen often incur the favor of special-interest groups by proposing and voting for certain legislation; in return for this support, congressmen often receive generous campaign contributions. This may reflect a community of interest, or expectations on both sides, or it may be an outright bribe.²³⁶ The interplay of congressmen and their constituents is rarely publicized by either; the circumstances would often permit a grand jury, led perhaps by an unfriendly United States Attorney, to issue an indictment on the basis of ambiguous evidence.²³⁷

The absence of ascertainable standards for distinguishing legitimate from illegitimate congressional motives reduces the en-

²³⁶ This argument was well expressed by the Association of the Bar of the City of New York:

In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so.

SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *CONFLICT ON INTEREST AND FEDERAL SERVICE* 14-15 (1960).

²³⁷ See *Regina v. Bunting*, 7 Ont. 524, 564-65, 568-69 (1885) (O'Connor, J., dissenting); Brief for Senator Brewster at 68-72, *United States v. Brewster*, 408 U.S. 501 (1972); 78 HARV. L. REV. 1473, 1475-76 (1965).

forcement of bribery statutes to subjective judicial perceptions on an ad hoc basis. The use of these statutes in cases where the charge of bribery is intertwined with privileged activity may have a detrimental impact upon the untrammelled functioning of the legislative process, because the inability of congressmen to know for certain the range of disallowed activities will tend to diminish their willingness to perform their legislative functions without inhibition.²³⁸ And this danger is magnified by the possibility that bribery statutes will be applied selectively against congressmen whose rapport with the White House may be less than ideal.²³⁹

In denying Senator Brewster's claim of immunity, the Supreme Court did not suggest the existence of ascertainable standards for judging the propriety of his motives nor, assuming the absence of such criteria, did it examine the effect such trials might have upon the legislative process. Instead, accepting a belated suggestion of the Solicitor General,²⁴⁰ the majority held that the

²³⁸ This ambiguity may well support an independent constitutional challenge on grounds of vagueness, either as a matter of due process or by analogy to the application of the vagueness doctrine in first amendment cases. Since a definition of impermissible activity appears impossible to construct, the bribery statutes put too much discretion in the hands of prosecutors and courts, thus "chilling" the legislator's exercise of his freedom of speech and debate. See generally Note, *The Void-for-Vagueness Doctrine in The Supreme Court*, 109 U. PA. L. REV. 67 (1960). On the invalidity of broad delegations of discretion in the free speech area, see, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

²³⁹ Much of our present law on the speech or debate clause may be traced to the efforts of a former United States Attorney, Stephen A. Sachs, who prosecuted both Representative Johnson and Senator Brewster. Sachs also obtained a bribery indictment and was appointed special prosecutor against Representative Dowdy (D., Tex.), who was subsequently convicted. *United States v. Dowdy*, No. 72-1614 (4th Cir., March 12, 1973). We certainly do not imply that any of these prosecutions were politically motivated. Sachs enjoys a well-deserved reputation for honesty and nonpartisanship; moreover, he is a Democrat, as are all three of the congressmen. Yet even this example does not mitigate the dangers of selective prosecution by more partisan prosecutors; when Sachs secured bribery indictments against congressmen who enjoyed political favor in the White House, Attorney General Mitchell ordered Sachs not to sign the indictments and the cases were dismissed. See N.Y. Times, May 29, 1970, at 1, col. 1.

²⁴⁰ The Solicitor General's petition for certiorari and original brief focused entirely upon an issue which had been left open in *Johnson*: whether Congress might enact a narrowly drawn statute which would criminalize bribetaking by legislators and authorize the executive to prosecute and the court to try the offending congressman. *United States v. Johnson*, 383 U.S. 169, 185 (1966). This raises the key issue of whether a member's individual privilege may be divested by decision of his house or by Congress as a whole, which is discussed *infra*, pp. 1164-71. The *Brewster* Court did not decide the divestment issue and relied instead upon a new argument — that bribetaking is not a legislative activity — raised by the Solicitor General for the first time in the Supplemental Memorandum for the United States on Reargument at 3-8, *United States v. Brewster*, 408 U.S. 501 (1972).

bribery indictment could be prosecuted successfully without inquiry into either legislative acts or their motivation. The majority reasoned: ²⁴¹

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment.

As with the *Gravel* holding on acquisition,²⁴² this statement is not very clear, because the Court did not explain how inquiry into a legislative act or its motivation is possibly avoidable. If a congressman decides to give a speech or cast a vote a certain way and he is indicted for having done so corruptly — as a result of a bribe — his motivation for the legislative activity is being called into question by the charge.²⁴³ Nor would it matter that he did not even speak or vote. The decisionmaking process by which a congressman decides to speak or vote, or to remain silent or abstain, would seem to be as much a legislative act as a speech or vote itself. An indictment for exercising that decision improperly directly challenges this decisionmaking process.²⁴⁴ The holding in *Brewster* thus must be that this basic decisionmaking process is not privileged and is thus subject to executive and judicial inquiry. Such a holding is, of course, consistent with the holding in *Gravel* that receipt of documents for use in congressional deliberations is likewise subject to extra-legislative restraint and sanctions.²⁴⁵

²⁴¹ United States v. Brewster, 408 U.S. 501, 526 (1972).

²⁴² See pp. 1155-57 *supra*.

²⁴³ Nor did the Court explain how this holding is consistent with the language of the statute, since 18 U.S.C. § 201 (c)(1)-(2) (1970) at no place mentions the word "promise." It says that no public official may accept anything of value in return for "being influenced in his performance" of an official act. See note 227 *supra*. The Court may have misconstrued the statute in order to save the indictment. See United States v. Brewster, 408 U.S. 501, 535-36 (1972) (Brennan, J., dissenting).

²⁴⁴ See *Ex parte Wason*, L.R. 4 Q.B. 573, 576 (1869).

²⁴⁵ It is difficult to reconcile Mr. Justice White's dissenting opinion in *Brewster* with his holding in *Gravel* that preparatory activity such as acquisition is not privileged. Justice White distinguished the preparatory acts in *Gravel* as being "criminal in themselves." United States v. Brewster, 408 U.S. 501, 555 n.* (1972) (dissenting opinion) (the footnote is marked only by an asterisk). There are

Taken together, the decisions establish that a congressman is immune from questioning about his speeches, debates and votes, but that he is accountable to the executive and judicial branches for his conduct in preparing his speeches, deciding how to vote, and telling the people why he spoke and voted as he did. One might conclude, with Mr. Justice Brennan's dissent in *Gravel*, that this result "so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system."²⁴⁰

C. Intervention Before Executive Agencies

In *United States v. Johnson*,²⁴⁷ Justice Harlan stated in dictum that congressmen who intervene before executive agencies on behalf of their constituents do so at their own risk:²⁴⁸

No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.

Yet the issue is more difficult than this casual disposition would indicate.²⁴⁹ It may be argued that there is a congressional role akin to that of an ombudsman with respect to executive agencies. With the tremendous growth of these federal agencies and the mushrooming number of bureaucrats, there is much to be said for members of Congress using their influence to protect constituents from injustice.²⁵⁰ And the positive effects of such intervention on the workings of government go beyond relief for individual constituents who feel helpless when confronted with a gigantic bureaucracy; the intervening legislator is also in a position to help administrators keep in touch with popular opinion con-

three problems with this distinction: (1) accepting a bribe is also a criminal act in itself; (2) the privilege, by definition, protects both legal and illegal activity; and (3) it is hardly clear that merely receiving classified documents violates any criminal statute. See note 218 *supra*. The last point is now being litigated in the trial of Daniel Ellsberg and Anthony Russo. See note 12 *supra*.

²⁴⁶ *Gravel v. United States*, 408 U.S. 606, 648 (1972) (Brennan, J., dissenting).

²⁴⁷ 383 U.S. 169 (1966).

²⁴⁸ *Id.* at 172.

²⁴⁹ See Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 372, 384 (1967); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 336, 346 (1965).

²⁵⁰ See, e.g., E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 79 (4th ed. 1967); B. GROSS, THE LEGISLATIVE STRUGGLE: A STORY IN COMBAT 140-41 (1953); SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 16 (1960).

cerning the activities of their agency.²⁵¹ In addition, studies of Congress attest generally to the fairly widespread nature of legislative intervention before executive agencies.²⁵²

While these arguments in support of the usefulness of intervention seem to us persuasive, there are countervailing considerations. Many congressmen believe that the practice is at least ethically questionable, since the line between legitimate assistance of constituents and illegitimate influence peddling is exceedingly narrow.²⁵³ Legislative proposals have been introduced to curb the practice, and a substantial number of congressmen do not go beyond sending a letter of inquiry to the agency.²⁵⁴

While some controversy thus surrounds the question of the propriety of intervention, that question need not be resolved when one analyzes the scope of the speech or debate clause in terms of its purpose — preservation of the system of separation of powers. The usefulness or even commonness of such intervention is not alone a sufficient index of the scope of the privilege. Historical redefinition of the privilege has consistently described its parameters not according to general notions of public policy, but according to the function of legislative prerogatives in the scheme of separate powers. Even if intervention by individual congressmen is useful and ethical, whether it is a proper "legislative function" is open to serious question. It is arguable that such intervention breaches separation of powers because it involves direct interference with matters committed by law for resolution by a coordinate branch of government. It would hardly be thought consonant with separation of powers for a congressman to intercede before a judge who was deciding the case of a constituent; on principle, the same may be true with regard to intervention before the executive branch. If a congressman does believe that an injustice has been committed by an executive agency (or, for that matter, by a court), he has adequate legislative tools at his disposal: he may hold hearings, expose the injustice and introduce remedial legislation. On balance, therefore, it would appear that Justice Harlan was correct in indicating that personal intervention before executive agencies would not fall within the ambit of the protection of the speech or debate clause.

D. Divestment of the Privilege

Although neither case was explicitly decided on this issue, in both *Gravel* and *Brewster* the Justice Department argued that

²⁵¹ See E. HERRING, *THE POLITICS OF DEMOCRACY: AMERICAN PARTIES IN ACTION* 383 (1940).

²⁵² E.g., J. BIBBY & R. DAVIDSON, *ON CAPITOL HILL* 15-16 (1967).

²⁵³ Cf. SUBCOMM., SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, *ETHICAL STANDARDS IN GOVERNMENT*, 82d Cong., 1st Sess. 19-30 (Comm. Print 1951).

²⁵⁴ See G. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 202-05 (1953).

each Senator's privilege was divested because of an asserted conflict with congressional practice, rules or statutes. In *Gravel*, the Justice Department originally claimed that the speech or debate clause did not protect any of the Senator's actions because the subcommittee meeting was allegedly "unauthorized" by the Senate rules, since the subject matter of the inquiry was said to be beyond the jurisdiction of the subcommittee.²⁵⁵ This claim — that the hearing was an "irregular" or "nongermane" activity and thus not a "legislative function" — was rejected by the district court and was not pursued in the higher courts.²⁵⁶ However, the divestment theory enjoyed more success when applied not to the lack of authorization for the committee meeting, but to the lack of authorization for the publication of its record. In both the court of appeals and the Supreme Court, the Justice Department stressed that such publication was not privileged because a private printer had been used and the full committee had not authorized the publication.²⁵⁷ Combining the "irregularity" and "nongermaneness" themes, the court of appeals²⁵⁸

dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of . . . lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern.

The Supreme Court did not explicitly embrace such a distinction, but it did suggest that Senate or committee authorization for the publication might make a difference in determining whether the privilege applied.²⁵⁹ Similarly, in the *Brewster* case the Justice Department claimed that the Senator's privilege had been divested by a narrowly drawn criminal statute by which Congress gave the courts jurisdiction to try congressmen accused of accepting a

²⁵⁵ The Justice Department's argument was that judicial review had often been exercised to control legislative committees which went outside their jurisdiction. Reliance was placed on cases in which the courts refused to hold in contempt of Congress witnesses who had been recalcitrant before legislative committees. See *United States v. Doe*, 332 F. Supp. 930, 935-36 (D. Mass. 1971).

²⁵⁶ *Id.* at 935. See also *Gravel v. United States*, 408 U.S. 606, 610 n.6 (1972).

²⁵⁷ This argument was pursued by the Solicitor General, who asserted that the chairman of the parent committee "apparently recognized that the republication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it." Brief for the United States at 42, *Gravel v. United States*, 408 U.S. 606 (1972). Actually, as Senator Dole stated on the floor of the Senate, the committee chairman, Senator Randolph, had not refused to authorize the republication, 118 CONG. REC. S 4620 (daily ed. March 22, 1972), and the district court refused to so find. Record at 88-89, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁵⁸ *United States v. Doe*, 455 F.2d 753, 759-60, 762 (1st Cir. 1972).

²⁵⁹ *Gravel v. United States*, 408 U.S. 606, 626 (1972).

bribe in return for a favorable speech or vote.²⁶⁰ This issue was left open by the Supreme Court majority,²⁶¹ although the three dissenters rejected the claim.²⁶²

While each of these positions advanced by the Justice Department is somewhat different, they basically involve the same question: whether the validity of a congressman's assertion of legislative privilege depends upon the approval or disapproval of his house.²⁶³ For two reasons, it should not. First, Congress should not be able to collectively circumscribe the constitutional rights of its individual members. The earliest American case to address the question — concerning a state constitutional provision analogous to the speech or debate privilege — held that because the privilege was personal to each legislator, the prohibition against executive and judicial inquiry into the exercise of legislative acts does not depend upon “whether the exercise was regular according to the rules of the house, or irregular and against their rules.”²⁶⁴ At most, legislative actions without house approval should subject a congressman to disciplinary actions by his colleagues; but such actions should not remove a congressman's personal constitutional rights.

Second, the rules of each house or “germaneness” and “regularity” do not define or set bounds upon the limits of the legislature's functions. These rules are established for the convenience and efficiency of each house, to allocate the exercise of these functions among its members and its committees. But whether a function is performed by the member to whom it has been delegated or by another member should not alter its character as a legislative function.²⁶⁵ And it is the characterization of an activity as a legislative function which brings it within the scope of the speech or debate privilege. Similarly, whether rules of procedure

²⁶⁰ This was the only argument made by the Justice Department in its brief. After the case was set down for rehearing, the Justice Department argued that the indictment could be proven without inquiry into any legislative act. The Supreme Court accepted the latter proposition, and the divestment issue was avoided. See pp. 1160-61 & note 240 *supra*.

²⁶¹ *United States v. Brewster*, 408 U.S. 501, 529 n.18 (1972).

²⁶² *Id.* at 540-49 (Brennan, J., joined by Douglas, J.), 562-63 (White, J., joined by Douglas and Brennan, J.J.).

²⁶³ This discussion assumes *arguendo* that approval or disapproval of the house may be inferred by comparing a congressman's actions with statutes or rules. But cf. note 272 *infra*.

²⁶⁴ *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This passage was quoted with approval in *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880). See also note 277 *infra*.

²⁶⁵ The district court in *Gravel* implicitly recognized this point in rejecting the Justice Department's argument of nongermaneness: “It has not been suggested . . . that the war in Vietnam is an issue beyond the purview of congressional debate and action.” *United States v. Doe*, 332 F. Supp. 930, 936 (D. Mass. 1971). See also *Dowdy v. United States*, No. 72-1614 (4th Cir. March 12, 1973), at 33.

are adhered to or violated has no bearing upon the character of the function being performed.²⁶⁶

Conversely, the mere imprimatur of a committee or the full house should not give constitutional protection to an otherwise unprivileged act. As with all other constitutional provisions, the contours of the speech or debate clause are ultimately established by judicial decision and not by legislative fiat. If an act of a congressman is *ab initio* unrelated to the proper functioning of the legislative process, a simple approval by the house should not magically transform it into a legislative act.²⁶⁷ Furthermore, the logic of a contrary conclusion would hold that the privilege protects only those congressmen who are in accord with the majority sentiment. In terms of separation of powers, it may be more important to protect dissenters, especially when a majority of the Congress supports the executive.

The use of germaneness and regularity standards by the courts in determining the applicability of the privilege in individual cases is thus inconsistent with both the individual nature and the functional definition of the privilege. Of course such use may also be barred by an argument extrinsic to the speech or debate clause, that the judiciary does not have the authority to enforce house rules.²⁶⁸ The assertion that a congressman may be disciplined by the executive and judiciary for otherwise privileged conduct because he violated the practices of his house necessarily presupposes that these branches have some general power to oversee the internal rules of the legislative branch.²⁶⁹ But Congress' power in article I, section 5 to make and enforce rules for its proceedings is a "textually demonstrable constitutional commit-

²⁶⁶ For example, Rule XIV (2) of the Rules of the House of Representatives imposes a general 1 hour time limit on individual floor speeches. Rule XIV (2), in L. DESCHLER, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 439, 91st Cong., 2d Sess., § 759, at 416 (1971). In practice, the Senate and House generally limit floor speeches much more severely — to 5 minutes in the House and 15 minutes in the Senate. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. If a congressman spoke longer than the time limit, it could not seriously be suggested that his speech was not a legislative function, even if he were disciplined by his house for violation of its rules.

²⁶⁷ This has been the rule in England at least since *Ashby v. White*, 92 Eng. Rep. 126 (Q.B. 1702), *rev'd on other grounds*, 1 Eng. Rep. 417 (H.L. 1703). See also *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1156 (Q.B. 1839).

²⁶⁸ Such an argument is one aspect of what is known as the "political question doctrine." See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁶⁹ This argument was in fact made in *Gravel* by counsel for the Justice Department in the district court proceedings. When asked by the court how he proposed to prove that Senator Gravel's actions had violated senatorial rules and practice, counsel replied that he might subpoena Senator Randolph, chairman of the parent committee. Record at 89, *Gravel v. United States*, 408 U.S. 606 (1972).

ment”²⁷⁰ and thus precludes general superintendence by the judicial branch.²⁷¹ How a house of Congress internally allocates its legitimate legislative functions, in committee and on the floor, is a question which is beyond the general cognizance of the other branches.²⁷²

With these principles concerning the internal rules of Congress in mind, we can evaluate one possible distinction between *Doe v. McMillan*²⁷³ and *Gravel*. The “republishing” sought to be enjoined in *McMillan* was pursuant to committee authorization and with the assistance of the Public Printer; Senator Gravel, on the other hand, did not seek or obtain parent committee approval for “republishing” the subcommittee record and used Beacon Press, a private printer. But such a distinction should have no legal significance. If the informing function is protected by the speech or debate clause, then an exercise of that function should be privileged regardless of the formal technique which an individual congressman uses in discharging it.²⁷⁴ If, on the other hand, the

²⁷⁰ *Baker v. Carr*, 369 U.S. 186, 217 (1962) (Brennan, J., speaking generally of the political question doctrine).

²⁷¹ This is not to say that Congress has exclusive authority under § 5 to discipline its own members in all situations. Activity which is not within the scope of the speech or debate clause (§ 6) may be prohibited by both house rules and criminal statutes, and offending congressmen would then be subject to sanctions by both the house and the judiciary. See *Burton v. United States*, 202 U.S. 344, 367 (1906); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 348 & n.83 (1965).

²⁷² Of course, when the enforcement of a statute depends upon a legislator's adherence to internal rules, judicial inquiry may be proper. For example, when a witness is prosecuted in the federal courts under the contempt of Congress statute, 2 U.S.C. § 192 (1970), for refusal to answer the questions of a committee, the courts may be obliged to examine internal house rules in order to determine whether the committee had jurisdiction of the matter; if it did not there could be no contempt. See, e.g., *Watkins v. United States*, 354 U.S. 178, 205-06 (1957). Except in a situation of this kind, the issue of jurisdiction is “peculiarly within the realm of the legislature.” *Id.* Thus, in *Yellin v. United States*, 374 U.S. 109 (1963), a recalcitrant witness was found not guilty of contempt because the committee had failed to follow its own rules, but the Court noted that the committee members nevertheless were immune from suit under article I, § 6. *Id.* at 121-22.

²⁷³ 459 F.2d 1304 (D.C. Cir. 1972), cert. granted, 408 U.S. 922 (1972). The facts of this case are discussed *supra*, p. 1119.

²⁷⁴ This point was made forcefully by the Senate in its amicus brief:

One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspaper reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use.

obligation of congressmen to enlighten their constituents is not part of the philosophy of the speech or debate clause, then the clause does not bar judicial inquiry even if the congressman acted pursuant to an order of the house.²⁷⁵ It may be noted that this conclusion — that the legislature cannot confer a privilege upon an otherwise unprivileged act — was enunciated in *Stockdale v. Hansard*,²⁷⁶ a decision which was relied upon by the majority in *Gravel*.

For similar reasons, Congress should not be able to divest any of its members of the privilege by a statute authorizing prosecution in the courts. As we have indicated, the privilege is guaranteed to each member personally, and its constitutional protection is not

It is not for the Executive to challenge nor for the Judiciary to judge a member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised.

Brief of Senate as Amicus Curiae at 6, *Gravel v. United States*, 408 U.S. 606 (1972).

Furthermore, technological developments in printing have persuaded many congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution. For example, we have been advised by the Library of Congress that the Bantam edition of the Kerner Commission Report had sales of 1,895,000 compared to 65,000 for the Government Printing Office edition (the latter costing three times as much); the sales of private editions of the 1966 Foreign Relations Committee hearings on the Vietnam War totalled 42,000, compared to 6023 for the G.P.O. edition. Senator Gravel's brief lists about 50 recent examples of private publications of House and Senate committee hearings. Brief for Senator Gravel at 86-88, nn.111-119, *Gravel v. United States*, 408 U.S. 606 (1972). Finally, it should be observed that the Public Printer has not had a status that is different, under either English or American law, from private printers who publish legislative proceedings. See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970); compare The Parliamentary Papers Act, 3 and 4 Vict. c. 9 (1840), with *Wason v. Walter*, L.R. 4 Q.B. 73 (1868).

²⁷⁵ There was a hint in the majority opinion in *Gravel* that the requirement in article I, § 5 that each house keep and publish a "Journal of its Proceedings" might lead to a different result "when Congress or either House, as distinguished from a single member, orders the publication and/or public distribution of committee hearings, reports or other materials." *Gravel v. United States*, 408 U.S. 606, 626 n.16 (1972). However, the history of this provision shows that it was designed to negate a privilege of secrecy claimed by the House of Commons rather than to create a privilege in either house. See p. 1138 *supra*. Moreover, protecting publications in the *Journal* would accomplish little, since the *Journal* generally records only the daily legislative schedule, and the results of votes, speeches and documents are recorded in the *Congressional Record*, which is an unofficial publication not required under § 5.

²⁷⁶ 112 Eng. Rep. 1112, 1156 (Q.B. 1839). This was a libel suit against the Public Printer who, pursuant to house order, had published and distributed a committee report critical of the management of Newgate Prison. The Queen's Bench held that the mere order of the house could not confer a privilege upon the Public Printer. But a statutory privilege was conferred upon the Public Printer by the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840). See also pp. 1180-81 & notes 324-34 *infra*.

subject to collective discretion.²⁷⁷ We have also argued that the scope of the privilege is defined by contemporary legislative functions, and that the definition of a constitutional privilege is the province of the courts, not the Congress. While a congressional decision that specific legislative conduct is a crime does indicate that the majority of Congress does not consider such conduct to be a proper legislative function, and while that decision should no doubt influence the court, it cannot be dispositive of the constitutional question. Congressional judgments on the propriety of legislative activities may well be suspect in some cases. If the Congress passed a law proscribing all floor speeches which in any way criticize the government, there could be little doubt that the proscribed activities would fall within the ambit of the speech or debate privilege.²⁷⁸ Moreover, Congress may make criminal activity which itself is not a "legislative function," but whose prosecution would necessarily require questioning about legitimate legislative functions.²⁷⁹ In these situations, the courts should be wary of subjecting individual legislators to sanctions that may be politically motivated and which infringe upon the freedom of legislative deliberation.

Finally, it must be admitted that in some cases wrongdoing may go unquestioned, uninvestigated, or unpunished because the courts will be found to be without jurisdiction over the offense and because the legislature will fail to discipline its members,²⁸⁰ perhaps for political reasons or out of solicitude for a member. Yet this consequence is inevitable if the speech or debate privilege is to serve its purpose of preserving legislative independence against executive and judicial infringement. It is not very probable that widespread legislative abuses are any more likely to follow contemporary vindication of the privilege than has been true in hundreds of years of English and American history. The occasional instances in which law enforcement is hindered are

²⁷⁷ See p. 1156 & note 222, *supra*. See also *Coffin v. Coffin*, 4 Mass. 1 (1808). [T]he privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. . . . Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

Id. at 27.

²⁷⁸ See *Mathew Lyon's case*, pp. 1142-44 *supra*, and *Duncan Sandys' case*, note 178 *supra*, for instances in which statutes of general applicability proscribed legislative functions when applied to representatives.

²⁷⁹ *E.g.*, bribery statutes. See pp. 1157-63 *supra*.

²⁸⁰ See *United States v. Brewster*, 408 U.S. 501, 521 (1972); Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 349 (1965).

more than counterbalanced by the preservation, intact, of our system of separation of powers.²⁸¹

E. Private Civil Actions

We have thus far examined the scope of the privilege in the context of disputes between the executive and the legislative branch. In these cases the privilege is asserted as a defense against the jurisdiction of the courts and serves its historic function of preserving a separation of powers. Congressmen who violate standards of law and decency in the course of their legislative activity are responsible to their peers in Congress and to the electorate; the theory of the privilege is that the risk of its abuse is far less than the risk created by permitting executive and judicial initiation of essentially political interrogation and discipline.

The literal language of the speech or debate clause does not distinguish between these classic separation of powers cases and disputes in which private citizens invoke the jurisdiction of the courts to enforce their rights against congressmen acting under color of law; and the public generally has come to believe that no such distinction exists.²⁸² Furthermore, in *Kilbourn v. Thompson*,²⁸³ *Tenney v. Brandhove*,²⁸⁴ and *Dombrowski v. Eastland*,²⁸⁵ the Supreme Court held that the privilege immunizes congressmen from suits seeking redress for the violation of individual rights.²⁸⁶

²⁸¹ As Pitt stated in his famous protest against Parliament's notorious action in stripping Wilkes of his privileges upon the claim of the Crown that law enforcement was being paralyzed:

Let the objection, nevertheless, be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the Parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the Parliament totally unprivileged, although notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial.

342 PROTESTS 68, 73-74 (1763); see note 131 *supra*.

²⁸² This probably explains the insignificant number of slander suits against congressmen for their speeches on the floor. For a lower court decision upholding the privilege in such a case, see *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1930), *cert denied*, 282 U.S. 874 (1930). See also *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1960).

²⁸³ 103 U.S. 168, 201-05 (1881).

²⁸⁴ 341 U.S. 367 (1951). This action was brought against state legislators under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (3) (1970). The Court held that the legislators enjoyed a common law privilege by analogy to the speech or debate clause.

²⁸⁵ 387 U.S. 82 (1967).

²⁸⁶ In *Kilbourn*, members of the House of Representatives ordered the unconstitutional arrest of the plaintiff for contempt. *Tenney* involved a state legislative committee that interfered with freedoms of speech and association. In *East-*

These decisions also indicate that the scope of the clause is effectively coextensive in executive-motivated and private-action cases.²⁸⁷

Although the early formulation of the speech or debate privilege only covered private civil suits, it developed toward protection against executive-motivated actions.²⁸⁸ If the historical development of the privilege did not transcend its judicial origins, it is unlikely that the legislative privilege would have been given constitutional stature. The cognate common law doctrine of judicial immunity to private suits did not find a place in article III; nor was the doctrine of executive immunity from such suits included in article II. And there is very little evidence that the Framers anticipated that the speech or debate clause would prohibit private actions.²⁸⁹ Only the traditional historical view would rigidly encompass this more ancient aspect of the privilege. Since the Supreme Court has not hesitated in the past to go beyond the literal language of constitutional provisions and construe them in light of their history and purposes,²⁹⁰ this line of private civil cases seems ripe for rethinking.²⁹¹

From a functional perspective, the values at stake in executive-motivated and private actions are very different. The private actions do not usually present the conflict of prerogatives between the executive and legislative branches from which the privilege evolved as a guarantor of legislative independence.²⁹² Nor do they

land, a Senate committee chairman ordered the issuance of an unconstitutional subpoena.

²⁸⁷ See *United States v. Johnson*, 383 U.S. 169, 180-82 (1966). The Court has suggested, however, that there may be legislative acts "of an extraordinary character, for which the members who take part may be held legally responsible." *Kilbourn v. Thompson*, 103 U.S. 168, 205 (1881). As an example, the Court opined that should congressmen order the execution of the Chief Justice, "we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." *Id.*

²⁸⁸ See pp. 1122-29 *supra*.

²⁸⁹ See p. 1172 *supra*. But see *Coffin v. Coffin*, 4 Mass. 1 (1808); note 138 *supra*. *Coffin* is the first recorded civil action involving the privilege in either England or America, but was litigated under Article 21 of the Massachusetts Constitution, which by its terms extended the privilege to civil suits.

²⁹⁰ A familiar example is the clause in art I, § 10 prohibiting the states from passing laws "impairing the obligation of contracts." For a narrow construction of this clause based upon its history and purpose, see *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934).

²⁹¹ In fact, despite the holdings in these cases, there are indications that the Court is willing to undertake such a rethinking. See pp. 1175-76 *infra*.

²⁹² Such a conflict could be present if, for example, executive officials who are under investigation by a congressional committee file a civil action in an attempt to thwart the investigation. Cf. Frankfurter, *Hands Off the Investigations*, 38 THE NEW REPUBLIC 329 (1924). A simple civil-criminal distinction would therefore be imprecise.

generally represent so great an intrusion upon legislative functions. In executive-motivated cases, the mere allegation that a crime has been committed is enough to trigger a grand jury investigation with powers of subpoena and interrogation so broad as to permit massive infringements upon the legislative sphere.²⁹³ If a prosecution is instituted, the congressman faces severe criminal penalties²⁹⁴ that depend upon how the trier of fact, influenced to an indeterminate degree by the political pressures of the time, subjectively evaluates the propriety of the legislative conduct; and even if the congressman is acquitted the course of a trial may ruin his political career.²⁹⁵ The potential inhibiting effect of such actions upon the willingness of congressmen to oversee corruption and maladministration by the executive is readily apparent. A broad construction of the privilege in these separation of powers cases is necessary to redress this imbalance of power.

In private civil actions, however, the pattern is usually reversed: a vulnerable individual seeks judicial protection against congressmen who allegedly have used the authority of their office to violate protected rights. It is true that if congressmen are

²⁹³ See *Gravel v. United States*, 408 U.S. 606, 631-32 (1972) (Stewart, J., dissenting); note 234 *supra*. Theoretically, the grand jury is an independent investigating agency, but its use as a tool of the executive is well known. See, e.g., *United States v. Dionisio*, 93 S. Ct. 764, 777 (1973) (Douglas, J., dissenting). Cf. *id.* at 773 (majority opinion). In the *Gravel* case, counsel for the Justice Department who was "supervising" the grand jury investigation characterized it as an "executive proceeding." Record at 8, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁹⁴ Representative Johnson was first convicted in June of 1963, see *N.Y. Times*, June 14, 1963, at 64, col. 2, and was sentenced to 6 months in prison and fined \$5000. *N.Y. Times*, Oct. 8, 1963, at 22, col. 1; *N.Y. Times*, Oct. 11, 1963, at 36, col. 1. After his conviction was reversed by the Supreme Court, *United States v. Johnson*, 383 U.S. 169 (1966), he was retried and convicted, see *N.Y. Times*, Jan. 27, 1968, at 33, col. 3, and was sentenced to 6 months in prison. *N.Y. Times*, Jan. 31, 1968, at 27, col. 4. His second appeal failed. *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

Following the Supreme Court decision denying his plea of privilege, *United States v. Brewster*, 408 U.S. 501 (1972), Senator Brewster was convicted of three counts under the bribery statute, 18 U.S.C. § 201(g), which carries a maximum penalty of 2 years imprisonment and \$10,000 fine on each count. See *N.Y. Times*, Nov. 17, 1972, at 7, col. 1; *N.Y. Times*, Nov. 19, 1972, § 4, at 12, col. 1. On February 2, 1973, he was sentenced by Judge Hart to the maximum on each count, the sentences to run consecutively.

Congressman Dowdy was convicted on eight counts of bribery, conflict of interest, and perjury. On February 23, 1972, he was sentenced to a total of 18 months imprisonment and a \$25,000 fine. On appeal, the judgment was reversed on the bribery and conflict of interest counts because evidence had been introduced at trial in violation of his speech or debate privilege, but the judgment on the perjury count was affirmed. *United States v. Dowdy*, No. 72-1614 (4th Cir., March 12, 1973).

²⁹⁵ See *United States v. Johnson*, 337 F.2d 180, 191 (4th Cir. 1964) (Sobeloff, J.), *aff'd*, 383 U.S. 169 (1966).

obliged to defend these actions on the merits, there is some possibility that they will be inhibited²⁹⁶ or distracted²⁹⁷ from the performance of their duties. And the institution of repeated lawsuits can be a successful form of harassment, even if the actions are meritless. But despite this possibility, the potential adverse effects upon the legislative process and the separation of powers cannot compare to cases in which the executive challenges the right of a congressman to inform the electorate about matters of great public importance.²⁹⁸

We do not suggest that courts should be oblivious to the possible effects of private actions upon legislative behavior. But these functional considerations imply that the position of congressmen sued in ordinary civil cases is little different from that of judges or high executive officials. The Supreme Court has concluded that the threat of such actions against judges and executive officials might chill the discharge of the obligations of their office and has therefore maintained a federal common law privilege.²⁹⁹ For two reasons, such an approach in the case of legislators would be preferable to reading the speech or debate clause as affording a constitutional immunity: (a) judicially-developed common law rules on immunity can be superseded by congressional legislation to protect individual rights; and (b) if experience convinces the Court that abuses of the immunity rules outweigh the benefits which result from them, those rules may be liberalized or even eliminated.³⁰⁰

Even assuming, however, that tort suits in general should or will continue to be precluded by the speech or debate clause, functional considerations indicate that the courts should exercise their jurisdiction and consider redress for legislative violations of in-

²⁹⁶ See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

²⁹⁷ See *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

²⁹⁸ Civil actions certainly embrace the possibility of significant sanctions. Money damages may be extensive, unlike criminal fines; harm to reputation may be great; discovery rules allow extensive investigation; and such litigation may drain a congressman's time and resources for years. But criminal prosecutions raise far more intrusive possibilities: jail terms, fines, extensive publicity, expenditure of time and resources, contempt citation, and irreparable political costs, all preceded by widespread probing at the hands of massive executive investigatory machinery. Moreover, the legitimacy of executive-motivated actions is more suspect than that of civil suits.

²⁹⁹ See *Pierson v. Ray*, 386 U.S. 547 (1967); *Spalding v. Vilas*, 161 U.S. 483 (1896). See also *Barr v. Matteo*, 360 U.S. 564 (1959).

³⁰⁰ Several justices have argued that the related doctrines of judicial and executive immunity should be limited by a malice exception. See *Pierson v. Ray*, 386 U.S. 547, 566-67 (1967) (Douglas, J., dissenting); *Barr v. Matteo*, 360 U.S. 546, 579-84 (1959) (Warren, C.J., dissenting). But see *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

dividuals' *constitutional* rights. That kind of situation presents two competing constitutional principles — the constitutional rights of individuals pitted against the assertion of legislative privilege.³⁰¹ Our system of separation of powers suggests that the balance be drawn on the side of judicial review. The judiciary in our country has always borne the institutional responsibility for protecting individuals against unconstitutional violations of their rights by all branches of the government.³⁰² Judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman. The speech or debate clause cannot be read in isolation from the entire constitutional scheme; judicial respect for and enforcement of the Bill of Rights is no less important than respect for the prerogatives of individual congressmen.

Despite the fact that no civil action has yet been permitted against congressmen for unconstitutional legislative action, the Supreme Court has adopted a compromise which has allowed aggrieved individuals to obtain judicial redress. In *Kilbourn, Eastland* and *Powell v. McCormack*,³⁰³ the Court dismissed the actions against the congressmen but allowed the actions to proceed against legislative employees who enforced the unconstitutional legislative order.³⁰⁴ These decisions present no conceptual difficulty. The employees involved were acting as ordinary law enforcement officials in executing an unconstitutional act and infringing protected rights. The presence of these employees as enforcement agents enabled the Court to adjudicate the legality of the congressional act and to vindicate the constitutional rights of the plaintiffs without inhibiting congressmen in their duties.³⁰⁵

In some situations, however, this compromise may not afford enough protection, since congressmen possess the power to in-

³⁰¹ This is not the case when the privilege is asserted as a defense to executive-motivated actions. The executive may contend, of course, that the action was instituted because a congressman intruded into its prerogatives. But article II does not purport to give the executive personal rights which it may vindicate by imposing coercive sanctions upon inquisitive congressmen.

³⁰² But a proper judicial role in executive-motivated suits requires a broad definition of the privilege, *see pp. 1146-48 supra*.

³⁰³ 395 U.S. 486 (1969).

³⁰⁴ In *Kilbourn*, the Court held the Sergeant-at-Arms liable for executing an illegal arrest. *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880). In *Eastland*, counsel for the Congressional committee was alleged to have conspired with state officials to conduct an illegal search and seizure; and the Court reversed a lower court judgment dismissing an action against him. *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967). In *Powell*, the Court asserted judicial review over the House Clerk and Doorkeeper who had executed an unconstitutional order excluding Congressman Powell. *Powell v. McCormack*, 395 U.S. 486, 503-05 (1969).

³⁰⁵ *See Gravel v. United States*, 408 U.S. 606, 617-20 (1972).

fringe rights of free speech, association and privacy without having to call upon the assistance of enforcement agents. *Tenney v. Brandhove*³⁰⁶ presented just that situation, yet the Court dismissed the action on the basis of a common law legislative privilege.³⁰⁷ *Tenney* may have been overruled sub silentio in *Bond v. Floyd*,³⁰⁸ but in *Powell* the Court specifically left open the question³⁰⁹

[w]hether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agents participated in the challenged action and no other remedy was available.

This question may now be before the Court in *Doe v. McMillan*.³¹⁰ The plaintiffs in that case seek declaratory relief and an injunction to prevent the members of a house committee, their assistants and the Public Printer from republishing and distributing a document which allegedly would be an unconstitutional bill of attainder and invasion of privacy. Presumably, the holding in *Gravel* that "republishing" is not within the scope of the privilege will dispose of the speech or debate defense. However, if the Court distinguishes *Gravel*³¹¹ it will then be confronted with a

³⁰⁶ 341 U.S. 367 (1951).

³⁰⁷ See notes 284, 286 *supra*.

³⁰⁸ 385 U.S. 116 (1966). Legislator-elect Julian Bond had been excluded from the Georgia House of Representatives because of certain anti-war speeches. As in *Tenney*, a suit was instituted under 42 U.S.C. § 1983 (1970) claiming that this legislative action violated the first amendment. The Supreme Court held for Bond without even a passing reference to *Tenney*. Arguably, the cases are distinguishable because Bond sought injunctive relief only, while *Brandhove* sought damages. But the doctrine of legislative privilege has always been structured in jurisdictional terms, independent of the kind of relief being sought by the plaintiff. Furthermore, while a grant of damages may perhaps have a greater deterrent effect on individual legislators (who may, however, be reimbursed by their house) an injunction is a much more direct intrusion by the judiciary into the legislative process and is enforceable by the threat of contempt proceedings.

³⁰⁹ 395 U.S. 486, 506 n.26 (1969). See also *Gravel v. United States*, 408 U.S. 606, 620 (1972).

³¹⁰ 459 F.2d 1304 (D.C. Cir. 1972), *cert. granted*, 408 U.S. 922 (1972), *argued* Dec. 13, 1972, 41 U.S.L.W. 3343.

³¹¹ One possible distinction is between activities approved and those disapproved by the house, but this distinction does not appear to be tenable. See pp. 1166-68 *supra*. A second possible distinction may have been suggested by certain language in *Brewster*:

Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but . . . its purpose [was not] to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.

United States v. Brewster, 408 U.S. 501, 516 (1972) (footnote omitted). Hope-

direct clash of privilege versus individual constitutional rights. It is theoretically possible that an injunction addressed solely to the legislative employees and the Public Printer would not afford sufficient relief; if the congressmen wish to reproduce and circulate this document, they need only xerox and mail it themselves. Legislative privilege should not foreclose effective judicial review in such an eventuality. It would be a supreme irony if the speech or debate privilege, which was designed to protect against executive intimidation and was placed in a constitution under which courts protect individual rights, were construed so that courts lend their assistance to the executive in breaching the wall of separation of powers but deny relief for the violation of individual rights.

IV. LEGISLATIVE REMEDIES

Since the Supreme Court has now held, in effect, that the speech or debate clause does not bar grand jury investigations of and criminal prosecutions against congressmen for deciding how to speak or vote and for informing themselves and the electorate about maladministration and corruption in the executive branch, it remains for Congress to remedy, if possible, the inferior position in which it has been placed. The importance of the Court's decisions goes well beyond the fate of individual Senators such as Gravel and Brewster; the scope of executive and judicial superintendence of the legislative process which is permissible as a result of these decisions jeopardizes the ability of the elected representatives in Congress to carry out independently and meaningfully the powers vested in them by the Constitution.

Congress should begin by considering whether it agrees with the Supreme Court that protection against executive intimidation is not constitutionally required with respect to functions other than those that are "purely legislative," such as "political" activities and "'errands' for constituents." These include "making . . . appointments with government agencies, assist[ing] in securing government contracts, [and] preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress."³¹² Should congressmen decide that some or all of

fully, the Court is not suggesting that the Framers intended to leave congressmen vulnerable to executive intimidation but free to violate the rights of individuals.

If the plaintiffs in *McMillan* are able to overcome the jurisdictional defense of legislative privilege, it is by no means certain that they should obtain the relief they seek on the merits. Even assuming their factual allegations to be true, the plaintiffs nevertheless are asking for a judicially-imposed prior restraint upon publication, and thus upon the first amendment rights of the publishers.

³¹² *United States v. Brewster*, 408 U.S. 501, 512 (1972). See also note 196 *supra*.

these "errands" are vital elements of the legislative function in a democratic society and resolve to strengthen the bulwark of separation of powers, there are two possible legislative remedies available, one more effective than the other.

A. House Resolution

Each house has the constitutional power to make rules for its own functioning.³¹³ Such rules could include a provision forbidding any member, aide, or employee from appearing outside the house to give testimony or produce house or committee documents relating to a wide range of "legislative" and "political" activities.³¹⁴ Such a rule could of course be waived by a vote of the house.³¹⁵ If such a rule were respected, this would effectively halt grand jury investigations and court hearings into the defined activities by preventing the receipt of important evidence.

However, lacking the formal dignity of a statute, a mere rule of the house would probably be insufficient to remedy the effects of the *Gravel* and *Brewster* opinions.³¹⁶ Such a rule would be binding in the sense that any member, aide, or employee who violates it would be subject to the disciplinary powers of the house, including the contempt power.³¹⁷ The rule would not, however, be binding upon the court which seeks to enforce a subpoena against a recalcitrant witness, because the order of one house of Congress cannot amend or supersede power vested by statute in a court or grand jury. Furthermore, it has been settled law in both England and America that a single house does not have the power to define its own privileges.³¹⁸ It would therefore seem that a house rule would have no more legal effect on the

³¹³ U.S. CONST. art. I, § 5.

³¹⁴ Senate Rule XXX, for example, already restricts the giving of outside testimony by Senate employees without the permission of the Senate. Senate Standing Rule XXX, in *SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE*, S. DOC. NO. 92-1, 92d Cong., 1st Sess. 49 (1971). In the *Brewster* case the "privilege of the Senate" and Rule XXX were invoked as the basis for a resolution authorizing David Minton, a staff director and counsel of the Committee on Post Office and Civil Service, to respond to a subpoena issued by the trial court in *Brewster*, but restricting his production of committee documents. S. Res. 373, 92d Cong., 2d Sess., 118 CONG. REC. 16,766 (daily ed. 1972).

³¹⁵ See S. Res. 373, 92d Cong., 2d Sess., 118 CONG. REC. 16,766 (daily ed. 1972).

³¹⁶ It should be remembered that any proposed legislative remedy would seek only to ameliorate the effects of the Supreme Court's construction of the privilege. Congress cannot change the scope of the speech or debate clause as interpreted by the Supreme Court without a basic judicial rethinking of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³¹⁷ Cf. *Groppi v. Leslie*, 404 U.S. 496 (1972); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

³¹⁸ See pp. 1167-70 *supra*.

courts than the amicus brief of the Senate which was filed with the Supreme Court in *Gravel* to express the collective judgment of that body.³¹⁹

Moreover, the passage of a house rule may have practical consequences which are not pleasant to contemplate. A member, aide, or employee subject to such a rule and also subject to a conflicting judicial subpoena would potentially be in the position of facing a contempt citation regardless of what he does: if he obeys the subpoena he will be in contempt of the house, if he obeys the house rule he will be in contempt of the court. This presents the possibility of a direct constitutional confrontation, and one side may back down. Faced with this confrontation the court may decline to enforce the subpoena, holding that the witness was justified in refusing to testify; or the house may waive the rule and allow the subpoena to be enforced. However, both the court and the house may see their essential prerogatives at stake and refuse to compromise, a result which occurred in England during the 1800's with unfortunate results.³²⁰

B. Congressional Statute

The more practical means for effectuating that degree of privilege which is necessary for Congress to function without unwarranted executive and judicial interference would appear to be the passage of an appropriate statute. Since Congress has the undoubted power to define the scope of the criminal law and to regulate the jurisdiction and procedure of the federal courts, it possesses ample power to protect its members from decisions such as *Brewster* and *Gravel*.

Congress should prohibit grand jury investigations and criminal proceedings which "question in any other place" the legislative activities of a member of Congress and his staff by stripping the grand jury and courts of jurisdiction to entertain such proceedings.³²¹ For the purpose of this statute, "legislative activities" should be defined as any activity relating to the due functioning of the legislative process and the carrying out of a member's obligations to his house and his constituents. The following should be included specifically: speeches, debates, and votes; conduct in committee; receipt of information for use in legislative proceed-

³¹⁹ Amicus Brief of United States Senate, *Gravel v. United States*, 408 U.S. 606 (1972).

³²⁰ See the discussion of *Stockdale v. Hansard*, 112 Eng. Rep. 1112 (QB. 1839), *infra* at 1180-81. This confrontation was settled only by passage of the Parliamentary Papers Act, discussed *infra* at 1181.

³²¹ The same result would occur if Congress were to enact a statute exempting the legislative activities of members of Congress from the criminal prohibitions of the United States Code.

ings; publications and speeches made outside of Congress to inform the public on matters of national or local importance; and the decisionmaking processes behind each of the above.

Enforcement of such a statute would require a delicate procedural mechanism which would ensure not only that the legislatively defined area of privilege is not being infringed, but also that permissible inquiries are not thwarted. Such a mechanism is available via control of the subpoena power. Congress could provide by statute that a member may move to quash any subpoena which he alleges seeks testimony about legislative activity³²² and that such a motion would automatically stay the subpoena. For the subpoena to be enforced, the prosecutor would be required to specify the nature and scope of the proposed inquiry.³²³ If it appears to the court that this inquiry infringes upon the forbidden area, the court would quash the subpoena. If the proposed inquiry is permissible under the statutory guidelines, the court would enforce the subpoena with an appropriate protective order against "fishing expeditions" into the Capitol.

This legislative solution is similar to that adopted by the English Parliament to counteract the effects of *Stockdale v. Hansard*,³²⁴ in which successive suits were lodged against the Printer of the House of Commons for "republishing" allegedly defamatory legislative proceedings. When the court held, contrary to prior precedent,³²⁵ that the privilege did not protect publications by the Public Printer, the House of Commons passed a resolution stating that the publications were privileged.³²⁶ Unimpressed, the Queen's Bench held that the resolution was not binding:³²⁷

[T]he mere order of the House will not justify an act otherwise illegal, and . . . the simple declaration that that order is made in exercise of a privilege does not prove the privilege . . .

When Stockdale's lawyer sought to execute the judgment, the House ordered the sheriff not to enforce the court order and as a precautionary measure ordered the Sergeant-at-Arms to arrest the

³²² In *Gravel*, the Court noted that the privilege is "invocable only by the Senator or by the aide on the Senator's behalf," from which "[i]t follows that an aide's claim of privilege can be repudiated and thus waived by the Senator." *Gravel v. United States*, 408 U.S. 606, 622 & n.13 (1972).

³²³ If a claim of confidentiality were made by the prosecutor, the specification could be made *in camera*.

³²⁴ 112 Eng. Rep. 1112 (Q.B. 1839); 174 Eng. Rep. 196 (Nisi prius 1837).

³²⁵ See *Rex v. Wright*, 101 Eng. Rep. 1396 (1799).

³²⁶ See WITTKE, *supra* note 46, at 142-51.

³²⁷ *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1169 (Q.B. 1839) (Denman, C.J.).

sheriff.³²⁸ The impasse was deepened by further procedural battles in which the plaintiff unsuccessfully sought an attachment against the sheriff and the sheriff unsuccessfully petitioned the Queen's Bench for a writ of habeas corpus.³²⁹

The deadlock was finally broken with the passage of a remedial statute. After a monumental debate in which leading members of the House excoriated the *Stockdale* court for placing restraints on the ability of Parliament to inform the people,³³⁰ both houses passed the Parliamentary Papers Act.³³¹ The Act was prefaced by the claim that "it is essential to the due and effective . . . [functioning] of Parliament . . . that no Obstructions or Impediments should exist to the Publication of . . . Reports, Papers, Votes, or Proceedings" and that there had been too many vexatious lawsuits against printers which threatened to hinder such publication. The Act provided that all subpoenas in criminal or civil proceedings against any person for the publication of papers printed with the approval of the house were to be stayed³³² and that upon production of a certificate of such approval, the proceedings were to be dismissed. Through this procedural mechanism Parliament was able to stop at the outset suits which jeopardized its informing function.³³³ By this statute Parliament was able to ensure that the *Stockdale* opinion was an aberrant breach of legislative independence which would never occur again.³³⁴ Congress should ensure the same fate for the *Gravel* and

³²⁸ See WITTKÉ, *supra* note 46, at 151-54.

³²⁹ See *id.* at 152-55.

³³⁰ See, e.g., 52 PARL. DEB., H. C. (3rd ser.) 330-33 (Lord John Russell), 334-35 (Attorney General Campbell), 361-69 (Sir Robert Peel) (1840).

³³¹ 3 & 4 Vict., c. 9 (1840).

³³² Our proposal would protect activities generally defined by statute, not activities approved in specific instances by the house.

³³³ This concern for terminating proceedings in violation of the privilege at the earliest stage possible is not unlike the concern of American courts that the mere threat of litigation might be sufficient to deter a legislator and that the defense of privilege should therefore be asserted on a motion to dismiss or motion for summary judgment. See *Powell v. McCormack*, 395 U.S. 486, 505-06 & n.25 (1969).

³³⁴ The courts themselves were later to repudiate *Stockdale*. In *Wason v. Walter*, 4 Q.B. 73 (1868), a newspaper was sued for publishing allegedly defamatory legislative speeches. Since the publication was not pursuant to formal house approval, the Parliamentary Papers Act was inapposite. Nevertheless, the plea of privilege was upheld. While giving "unhesitating and unqualified adhesion" to the "masterly" judgment of the *Stockdale* court that a mere resolution of the house could not confer privilege, the *Wason* court held that the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.* at 86-87. On this latter point, the *Wason* court severely criticized the reasoning of *Stockdale*, saying it had expressed "a very shortsighted view of the subject." *Id.* at 91. Stressing the centrality of the informing function to representative government, the *Wason* court forcefully upheld the privilege for publication

Brewster decisions, which represent a much greater threat to legislative independence.

We have discussed proposed legislative remedies only with respect to executive-motivated actions. Congress would be ill-advised to extend any limitation upon court jurisdiction to include civil suits by citizens claiming the deprivation of constitutional rights. Legislative remedies should be designed to protect our system of separate powers; congressmen who would abuse their position and impinge upon rights secured by the Constitution transgress the great principle of separation of powers and give ammunition to those who believe that the concept of legislative privilege has no place in our contemporary society.

in terms almost identical to Jefferson's protest in *Cabell's* case, *supra* note 150. *Wason v. Walter*, *supra* at 89.

The above analysis was accepted by the dissenters in *Gravel v. United States*, 408 U.S. 606, 658-60 & n.1 (1972) (Brennan, J.). But the majority relied heavily upon *Stockdale* and distinguished *Wason* as creating a privilege analogous to the judicial privilege. *Id.* at 622-23 & n.14. It must be remembered, however, that legislative privilege derived historically from judicial privilege, and to the English courts, the two are corolaries insofar as civil suits are concerned. See pp. 1122-23 *supra*.

Representative BROOKS. Each of you has a statement by Senator Helms setting out his individual views on the subject of these hearings. There being no objection, I will include at this point Senator Helms' statement for the hearing record.

[The statement of Senator Helms follows:]

INDIVIDUAL VIEWS OF SENATOR JESSE HELMS (R.-N.C.)

I am deeply disturbed by the present day tendency in many quarters to broaden the scope and make absolute the privilege of immunity from prosecution or proper inquiry. The ultimate effect of this tendency will be to create a certain elite of privileged classes who are above the law and beyond the scope of effective scrutiny and restraint. I apply this observation to all three branches of government, and to the so-called "fourth estate" in which I have spent most of my professional career until I was elected to the Senate.

The natural ambition of most human beings is to stake off a square of territory for his own, and then attempt to defend it against all comers. If we stand inside our little square, then we feel threatened by our challengers. The ordinary impulse is not merely to defend our rights, but to enlarge upon them, and to erect impenetrable barriers around the new boundary.

I think that something of this sort is happening in the current hearings. As a U.S. Senator, I believe strongly in the Speech and Debate Clause, but I do not think that it should be expanded so that it includes nearly every living and breathing action of a Member of Congress. It quite properly says that they should not be questioned in any other place for a Speech or Debate in either House. But this was not intended to give broad immunities. Just previous to the Speech and Debate Clause, the Constitution spells out that they shall be immune from arrest, but with two important exceptions: They cannot be arrested (1) during the session, and (2) except for treason, felony, and breach of the peace.

Historically, the Framers of the Constitution must have been thinking not of the individual, but of George III's manipulations of the legislative bodies of the Colonies and the pressures applied against them so admirably described in the Declaration of Independence. Even so, the Constitution sanctions arrests for treason, felony, and breach of the peace, whether Congress is in session or not. These are crimes of individuals, and crimes ought to be punished. Bribery, for example, is a felony. The acceptance of money to influence a vote is wrong, whether or not the desired vote actually follows in due course. If a Member of Congress is convicted of taking a bribe, then it is irrelevant how he voted afterwards.

It is said that the Senate or the House will appropriately censure wayward members, or that the voters will make the ultimate decision. Speaking realistically, we know that it is not so. The loyalties of party members, the protection of friends, the power of high position all combine to make such punishment a rare event; and when it does occur, more often than not it carries political or ideological overtones. When one man can be made a pariah, then it is easier for the rest of the group to knock him down. The lack of objectivity in such proceedings makes each one fear that he will be the next for a trumped up purge.

As for the people turning the rascal out, we know that such a proceeding is also uncertain. A case of wrong-doing may turn upon subtle distinctions in law or intention; the public may never get the proper facts or perspective; and there is no agency charged with the mission of sorting out the evidence and finding the proper witnesses. The procedure is based upon happenstance. I think that the Speech or Debate Clause should be narrowly interpreted. There are enough elastic clauses in the Constitution as it is.

Speaking as a United States Senator, I believe the same interpretation should also be applied to the other two branches of government. The Judiciary itself is not beyond reproach. It is perfectly proper for Congress to exercise continuing oversight over the Judiciary, and to define and regulate the concept of holding office during "good behavior." Each branch of the government has the right to define the Constitution according to its own lights; and at the same time it is the right, indeed the duty, of the other branches to fight for their own views. The only safeguard of liberty is for a constant state of tension to exist between the three branches, and for each one to be vigorously asserting its rights. If we erect

a rigid wall of separation between the three branches, then the Constitution will lose its dynamic ability to survive. Nor will liberty survive.

Nevertheless, the assertion of rights should be prudent and not over-reaching. The Executive Branch is currently asserting its own privileges over a range which is unacceptable to most Members of Congress. The concept of Executive privilege in its most sweeping form raises only the notion that there is something to hide. I do not necessarily agree with the politically motivated arguments that there actually is something to hide in the present instance. But it is only human nature to assume that some day some Administration *will* have something to hide. Of the various privileges being asserted, the concept of executive privilege is the weakest and has the least Constitutional peg of all. But I would expect, as a matter of consistency, that those arguing for the broadest possible Congressional privilege would also, in fairness, argue for the broadest possible Executive privilege. But in reading the hearings, that does not seem to be the case.

Finally, we come to the fourth estate. There are some journalists who would place their profession on a Constitutionally sacrosanct level. To hear their impassioned argument, one would think that journalism itself was a Constitutionally erected branch of government dedicated to higher standards and finer morals than the representatives actually selected by the people. They speak in terms of a "free press" that "belongs to the people" and that is the last safeguard of the people's liberties.

As a journalist, I believe that the media have a role in informing popular opinion. They can play a constructive role in exposing corruption. But as for "belonging to the people," I might say that I am one person who has yet to get a dividend check from NBC or The Washington Post. The fact is that the media are private enterprises that reflect the interests and aims of their owners and/or practitioners. Their goals are no more high and mighty than those of any other very human institution. They are kept honest only through diversity, competition, and articulate scrutiny by public leaders. I do not think that the media should be immune from public criticism whether in government or ordinary citizens.

Nor do I think that the media should have a privileged position under the law beyond a reasonable interpretation of the First Amendment.

If the press is given an immunity to protect its sources, we must realize that there is no countervailing pressure to prevent abuses of such a privilege. A newsman is a self-appointed advocate, even if he believes himself to be an advocate of the public interest. The public has no choice in choosing him. They do not even pay his salary. His peers have little or no control over him. Moreover, a newsman has the obligation to balance protection of sources against whatever commitments he may be making to people who are violating the law. In the long run, the claims of justice are more important to public order than the claims of sensationalism or "informing the public" under a boldface byline.

Finally, a free press most needs to be a free press—that is free from laws circumscribing and defining its function. Laws asserting immunity by nature must limit and constrict, if they are to be workable. It is better to make no laws at all, than to make laws which allegedly give "protection."

Conflict is the essence of the system of checks and balances. But healthy conflict also assumes self-discipline. Each branch must be bold in asserting its rights, but it must also be bold in striking a balance between claims and common sense.

Representative Brooks. Since our last day of hearing in late March, the decision has been announced in the case of *Doe v. McMillan*—a case involving the publication and distribution of a report of the House District Committee.

Consistent with its interpretation of the Speech or Debate Clause in both the *Gravel* and *Brewster* cases, the court narrowly defined the legislative role of the Congress. In doing so, the court has posed a serious challenge to the Congress and to its independence in discharging its constitutional responsibilities.

The *McMillan* decision serves to underscore the need for this inquiry.

Since the *McMillan* decision is new to our inquiry and since it involves the immunity of legislators to a civil action brought by private individuals, it serves as a good point of departure for our discussion.

It raises questions such as :

What is the legislative role of Congress?

What would the Congress have to do to comply with the Court's view?

How should the Congress respond?

Mr. Valder, as an advocate for petitioners seeking to stop the publication and distribution of a committee report, can we hear from you first?

Mr. VALDER. Thank you. The only thing we tried to do was delete the names of our clients from the report. Once we got through 1 day in the district court, having filed the case in the morning and being dismissed in the afternoon, our request from then on was merely to excise the identifying names and addresses from the report. That concession was made very clear to both the court of appeals and the Supreme Court. The focus of our case was more upon the committee staff personnel, the investigators, than it was on Members of the Congress and members of the committee.

It was our view that, had the rules of the House been followed in this case, the case would never have arisen. The rules provide for various ways of protecting privacy and of guarding against possible defamation or degradation of reputation. None of those rules were followed.

I am referring specifically to rule XI, 27(m), which provides that, where any material of this sort is involved, subpoenas, protections, opportunity of private persons to appear, all of those procedures are provided. But, of course, they weren't used at all in this case.

We view this case as an aberration, as a case indicating what can happen when investigators possibly, in our allegation, were more interested in sensation and exposure and worked generally without supervision.

As the record makes clear in our case, the District of Columbia Committee never voted on this report, in fact, never saw it until it was in print. Somehow the processes of that committee worked in such a way that the material was collected, assembled and sent off to the printer through the appropriate machinery of a vote in the House without most of the members of the committee even knowing the report was on its way or what it contained.

So in a practical sense, that is how we view the problem in the *Doe* case. Frankly, it never occurred to us that we would be able to hold Members of Congress for damages—possibly for injunctive relief, but certainly not damages—in this case. Of course the Supreme Court gave us considerably less than we had asked for. Members are immune. I think the case cannot be read any other way. Members have absolute broad immunity for anything dealing with legislative acts.

The case went off on the liability of the Public Printer and the Superintendent of Documents, when they exceeded the statutory publication permitted by, I think the usual publication is 1,682 copies with distribution specified to the Halls of this building and the office buildings that surround this building. When distribution went beyond that, or if it went beyond that, the Supreme Court said that can be enjoined if fundamental rights are being violated.

I view the problem you have as a practical one—essentially following your rules. I think your rules could be tightened. I don't think rule XI, 27(m), is as tight as it could be to protect against this kind of privacy invasion. But at least the idea was there. The spirit was there. If the investigator and the staff consultant had cared about following the rules, the case would have never gone to court. That is my sort of practical judgment on what you might do or what might be done differently.

I was an advocate in this case. I still have that advocate's perspective. But I think there is a substantial danger because of the size of the Congress and its broad investigations that these kinds of privacy invasions might continue or might recur. That bothers me as a lawyer, as a constitutional lawyer and civil rights lawyer.

People did get hurt in this case—we believe hurt badly. It's avoidable.

Those are my general observations. I think you might look at your rules with possible revisions in mind. In this case, this material should have come into the record during the hearing. It did not. There should have been some opportunity for committee members to see it and to grasp its significance. There was no such opportunity. That is just a matter of procedure. It could have been done.

Representative Brooks. Do you feel that the Court should be involved in the preparation of reports or the limitation in any way of reports when, it seems to me, that Congress has the legislative authority and that for the courts to interfere in any way with the preparation of reports which are a vital part of that legislative authority is actually an infringement on congressional legislative authority itself?

If the Supreme Court or the judicial system can restrain or prevent the preparation of reports, regardless of whether they met any test, they could effectively hamstring the entire legislative process.

My question is whether or not they really have any justification for interfering with reports at all, be they good, bad, or otherwise.

Mr. VALDER. Yes; this brings us to the separation of powers question, and the Court clearly resolves the issue by saying, yes, we have three coordinate coequal branches of Government, but the courts, the judicial branch will decide, in appropriate cases, if another branch has overstepped the Constitution, and in this case, the Supreme Court said there was a well-pleaded constitutional claim here, and that it would—as it did in the earlier cases, some of these old cases—the Court will sit in judgment upon an allegation that the Congress breached the Constitution, that constitutional rights of individuals are violated. That is, the separation of powers holding in this case, as I read this case, is that the courthouse doors are open.

If private individuals, if they have an allegation well pleaded that their constitutional rights had been violated by Congress, the Court will be open to adjudicate that claim.

The day is over when Members of Congress can ignore the judicial processes.

Now, Members of Congress have to defend——

Chairman METCALF. I doubt that. As you have outlined the case, there was congressional immunity, even though there was a failure,

as you alleged on the part of the congressional committee of the House, to abide by the rules that were laid down. Nevertheless, the Members of Congress were given immunity. It was just the Superintendent of Documents in the Government Printing Office that was punished for doing what the statute said he had to do.

MR. VALDER. Let me say one more thing. This case, this impacts you gentlemen more than you might realize. Although in this case the Congressmen are out, what this case means is that in any such case, Congressmen will still have to come into court and explain why they ought to be dismissed.

It used to be they did not even have to go to court, but not so now because some judge will have to decide whether you are in or out, so you have automatically lost some of your immunity.

Chairman METCALF. We sure have. As a result of this strict construction of the Court across the street, we have lost a whole lot of our powers. I think you will admit that, as a civil rights attorney.

Representative GIAIMO. Mr. Valder, as a Member of Congress who has been subjected as of the present to a total of \$12 million worth of lawsuits, I do have more than a passing interest in this matter.

I am not as familiar with the *McMillan* case as I am with the others, but do I understand the Court said in effect that we do not have immunity outside of our legislative function in invading, for example, rights of citizens?

MR. VALDER. That is a good statement of what I think holds.

Representative GIAIMO. OK.

Now, let me put it another way.

This was the subject of libel suits to which I was subjected and several other Members of Congress at present are subjected—one of which I think is still pending in New York—and the courts, as I understand it, theretofore had sustained at least a limited immunity to Congress to inform the public. Is not that right? It was sort of the reverse as we understood the law of the *New York Times* libel case, you know, which says, in effect, which, in effect, says you can libel a public official as long as there is no malice. The reverse of that seems to be that on which we relied in Congress. Not in our legislative activities in the Congress, but that in our broader public duties we can inform the electorate of things which are happening without having to be concerned as much as the private citizen does as to the absolute truth or veracity of the statement. Was not that true?

Professor KURLAND. Why do you say that is separate?

Representative GIAIMO. I will agree with you.

I hope it still is a legislative function; otherwise, I am afraid we are going to be very frightened, and perhaps more careful of speaking out.

We should always be careful of what we say, but if I have to worry after I make a speech, whether x is a malfeasant or x is a crook, or x is stealing Government possessions or money for thus and thus reasons—if I am going to have to worry about being hit with a \$10 million lawsuit, it frightens me.

What has your case done to that partial immunity which I think we did have and which the courts were applying—they applied it in several other cases—saying you have absolute immunity under the speech clause on the floor. You have some sort of lesser than absolute immunity, if you are speaking off of the floor.

Would you comment on that?

You put us in the position now where people can say anything they want about us under the *New York Times* doctrine—unless we can show malice, and that is not easy to show—whereas up until your case, we could go out and inform the public of what we thought was happening or what we thought certain individuals were doing without having to base our statement on the absolute truth or veracity.

I am not sure whether we can do that now. I would like to have your thoughts.

Chairman METCALF. I would like to hear from the others on the panel on that also, Congressman. Do you want to respond first, Mr. Valder?

Mr. VALDER. I will make one quick response.

It costs \$10 to file a lawsuit. There is no way in the world you are going to keep from being sued.

If somebody wants to sue you, they will sue you.

Representative GIAIMO. I am not worried about that. I understand everybody should have the right to bring a suit.

Mr. VALDER. It costs thousands of dollars to just get a case dismissed and get you out of that case within 6 months. You have already been subjected to a host of harassments, so I assume your question is what about cases that have some prima facie merit, that will get past that easy motion to dismiss.

Representative GIAIMO. That is not my concern.

Chairman METCALF. Let's hear from Professor Bickel.

Professor BICKEL. I think you overestimated the position before, and I do not think *McMillan* changes it much.

It seems to me to follow on *Gravel* and *Brewster* in saying that the absolute immunity, the constitutional immunity that you have does not go beyond a relatively narrowly defined legislative function. That is nothing new in *McMillan*.

Now, I do not think it has been true, Adam Clayton Powell had the contrary experience some years ago, that you have in speaking in New Haven or elsewhere, anything comparable to the kind of protection that newspapers have under the *New York Times v. Sullivan* case.

Perhaps you ought to.

Professor KURLAND. Why not start with the predicate of the *New York* case, the immunity in the *New York Times* case?

I do not think that the executive branch officials have it, but the legislative branch—

Professor BICKEL. I could perceive quite a difference. It seems to me that here is the executive branch, there is nothing in the Constitution that gives it any protection at all, and yet they exercise all kinds of discretionary functions, and within some limits of the exercise of those discretionary functions, you ought to have some protection. And then you go over to *Brewster*, and say what about Congress, and what they say about Congress is, well, that the Constitution has a provision, and it is more or less the equivalent of *Barr* and *Matteo*.

We all know it is more than that, it is an absolute protection. What does it reach?

Barr and *Matteo* in the executive branch reaches executive functions.

Here it reaches to the legislative function. If under *Barr* and *Matteo*, some executive secretary, if Secretary Shultz should make a speech,

give a paid lecture at the Yale Law School and libel me by calling me a conservative, let us say, I would think he would be liable under *Barr and Matteo*.

By the same token, if somebody should——

Representative GIAIMO. You say that is not a change in the law?

Professor BICKEL. I do think that you perhaps on the merits ought to be entitled to more immunity, more freedom, more elbowroom than you have, and you can legislate it, and I think to conclude the third point, on *Barr and Matteo*.

Chairman METCALF. Let us not just throw that phrase away.

You can legislate it. This is the subject of our inquiry.

Professor BICKEL. I do not doubt that. I do not read any of these cases as doing anything more than telling you what it is that the Constitution on its face automatically extends to you by way of protection.

I cannot conceive that you can construe the decision to limit legislation, legislative power on the part of the Congress.

Representative GIAIMO. In my case, two courts have held that we do have immunity in the statements that we make to our constituents off the floor of Congress.

Now, I am concerned whether we have that immunity at all. If we do not, I am going to be very careful and I am going to be intimidated in what I say as a legislator, which to me is a frightening concept.

I am going to be very intimidated not on the floor, but in what I say in New Haven.

I think that is a change. Certainly the two courts I have dealt with indicated I did have a broader immunity than the average citizen because of my duty, as is spelled out in the *McMillan* case. We do not doubt the importance of informing the public about the business of Congress, and they go on from there.

Professor KURLAND. It seems to me, that will put you in a trap. Unintentionally, of course.

He started talking about paid speeches by Mr. Shultz at the Yale Law School. And that essentially is the problem it seems to me that these various cases are framing. What is the legislative function?

Suppose you go back to your constituency in Connecticut, and say that in testimony before our committee, Mr. Bickel said he would be libeled if you called him either a liberal or a conservative. You were informing your constituents of what he said to you in your function as a legislator. That much more easily comes within a legislative function. And it seems to me the real problem of the series of three cases, is that the Court has undertaken to decide what falls within and what falls without the legislative function——

Representative GIAIMO. And they have narrowed it.

I think there was evidence they narrowed it in the *Brewster* decision.

Professor KURLAND. What they have said is that the dissemination of information to the constituency, which is what *McMillan* is all about, falls outside of the protection, at least when performed by an agent. At the same time, they said the agent has the protection——

Professor BICKEL. The example you gave was a quotation from a report to the constituency of legislative materials themselves.

I do not know if they say that would not be protected.

Professor KURLAND. What you had was data that was certainly a proper subject for communication to the Senate.

The publication of this data to the community was the thing that created the issue.

The question of whether that could be subjected——

Professor BICKEL. The arrangement of a private publisher. If *Gravel* had consisted of Gravel getting up, the Senator getting up in Boston and telling a public meeting that at a hearing held before his subcommittee, last week, the following materials were produced, and then reading them off, I do not think the Court is necessarily saying that is not protected.

Professor KURLAND. If Mr. Gravel had gone to Alaska and started to read the Pentagon Papers, you would have gotten the same issue.

Professor BICKEL. But if he had gone to Alaska, and said yesterday we had a hearing in the Senate, and I am about to read you out of the record of that hearing, I do not know that the *Gravel* or *McMillan* case decides that.

Chairman METCALF. Mr. Valder, there were allegations, of course, that Senator Gravel, who is a member of this committee, acted improperly and beyond the rules of the Senate Public Works Committee in reading the so-called Pentagon Papers at a subcommittee meeting. So the controversy was not precisely a result of a regular committee hearing, regularly scheduled and held.

He read the papers and arranged to have them published. Should that have made a difference, do you think? As you say, there was a violation of the rules of the House, in your case.

Mr. VALDER. I think there is a major difference in the *Gravel* and *Brewster* cases and that is the involvement of the executive branch, and another difference is in the terms of the role of the Court, as Professor Kurland just said, that is the new role of the Court.

They are going to decide what is legislative and what is not.

In the context of the *Doe* case, there is a private citizen here claiming a constitutional violation against Members and the staff, and so forth, and to me the advocacy that goes to a court on that case is so much different than the advocacy on enforcement of an executive branch subpoena, that, you know, they are alike in that the courts will make the decision, but they are unlike in all of the circumstances which brings that decision to the Court.

Now, the fact that Senator Gravel read that material in that case, and in our case it was a moonlighting exercise by a District of Columbia policeman where he went around town and got materials from unfaithful schoolteachers and principals and got it into a report. Yes, that is a difference to me, but that is a practical difference.

That just changes the advocacy in court. This investigator, this police sergeant, and Mr. Little, the committee staff consultant gave us so much to advocate. In my judgment it was the coloration of the case that got the Supreme Court to take it up in the first place.

There was a sharp constitutional allegation, and there was no action of the executive branch involved.

Chairman METCALF. What happens if Mr. Giaimo gets up and says that yesterday, at a hearing in the Capitol, Mr. Valder said that so and

so was a moonlighting cop and a lot of the District of Columbia school-teachers were unfaithful. Is that a violation of the civil rights and the privacy of those people, that moonlighting cop and those unfaithful teachers?

Mr. VALDER. Assuming that the policeman brings suit against Congressman Giaimo?

Chairman METCALF. That is right, or the teachers.

Mr. VALDER. I do not think Congressman Giaimo has anything to worry about, but he will have to hire a lawyer to get that case dismissed, and that will interfere with his legislative function.

Representative GIAIMO. So, therefore, it is better for me not to say anything.

Mr. VALDER. I would say it is better not to interfere with private persons.

Representative GIAIMO. As a Congressman, one who is supposed to be theoretically fearless in the public interest, I have to now begin to worry about what I said. Being mortals, we are all going to begin not to say things that perhaps should be said, because as a practical matter we will have to worry about being sued, about hiring a lawyer, and the Congress does not provide for paying me for the lawyer's services—and they come high in these cases—so the tendency is to say "I am not going to say anything."

Professor KURLAND. That brings us back to the proposition that Mr. Bickel made. You could legislate yourself some immunity.

Representative GIAIMO. We could legislate the lesser Federal courts out of existence too but that isn't the answer. We were covered in the past by court decisions.

Chairman METCALF. I want to hear this.

There is some difference of opinion on the committee as to whether we can broaden and expand the interpretation of the constitutional provisions as laid down by the Court. I would like to have a discussion by these people about our powers to legislate further immunity for Members of Congress.

Professor BICKEL. I am really at a loss to understand what the basis of the doubt is.

Why can't you legislate, legislate a law of libel, you are certainly legislating the rules about the law of libel for the Federal courts.

The only question would be whether the Federal interest is sufficient to enable you to cover the State law.

Professor KURLAND. I agree your proposition is what the law should be. But if I understand the *McMillan* case, is you can legislate a rule of exemption from liability up to the point where you are infringing on a constitutional right of an individual.

Professor BICKEL. The law has to be constitutional.

Professor KURLAND. Privacy now becomes a constitutional proposition, and you cannot legislate yourself immunity from this invasion of privacy.

Professor BICKEL. But they are surely going to have enormous difficulty in saying that privacy, as they define it, the last of the line of the *New York Times v. Sullivan* cases, is one thing, but privacy as Congress legislates it for purposes of expression of opinion by Congressmen is another, and that there is a constitutional impediment, inde-

pendent rights of privacy, that prevents Congress from passing a statute immunizing Congress in the same degree in which Metromedia, Inc., is immunized.

Professor KURLAND. The immunity can be extended to the point where the Supreme Court says the immunity is protecting you from the liability for evading a constitutional right. That is the limit.

Professor BICKEL. Metromedia, if that is the limit, then Mr. Giaimo will have very little to fear.

Professor KURLAND. Let me say——

Chairman METCALF. I would like Ms. Lawton to get into this.

Representative GIAIMO. Can I make a request with unanimous consent that all references in the record to Congressman Giaimo be changed to John Doe?

We are going to have a printed record.

Chairman METCALF. Without objection, we will provide that change in the record.

Ms. LAWTON. I think there is legislation dealing with speech, and it may be a great deal easier to justify than when it comes into a conduct area; after all the Speech and Debate Clause literally mentions words, and——

Chairman METCALF. Dealing with speeches in the Senate, or on the House floor, or even in committee?

Ms. LAWTON. I mean even before that, the problem is defining where it relates to the legislative role.

A Congressman who was previously a schoolteacher, who goes out, while a Member of Congress, and makes libelous statements based on his experience as a schoolteacher, having very little if anything, to do with his experience as a legislator. I question whether an immunity statute could be drafted so broadly as to protect him, because he is a Congressman, not because his speech relates to his congressional function, but because he is per se a Congressman, I have some doubts that legislation could be that broad.

Again, even for matters occurring while he is in Congress, suppose he has a hobby of genealogy, and he is making a paid speech based on his hobby, which he continues with while a Congressman, but it is not related to his congressional duties, could legislation by the Congress protect him, not because of any relationship of legislative role. There I have more doubt.

Chairman METCALF. Say we have a man who is a Member of Congress, who was formerly a vice president of a utility company. In this time of an energy crisis, he stands up on the Senate floor, or the House floor, and makes a speech, in which he says that this crisis is the result of the fact we have not had adequate rates for utilities. His defense of the utility program is obviously the result of his previous experience as a representative of a utility company.

Now, I think there is no question but that that speech on the floor would be privileged; is that not right?

Ms. LAWTON. Yes.

Chairman METCALF. Now, suppose he mails that speech out in a newsletter, and broadcasts it to all the people in his State or district. Is that privileged?

Ms. LAWTON. I cannot see where it would be infringing on any other right.

I think at least arguably it is privileged, yes.

Chairman METCALF. Even though there might be a question of ethics?

Ms. LAWTON. There may be a variety of questions. There is so much that depends on the facts that it is almost impossible to say now.

Chairman METCALF. Now, let us take this same man, who can defend his utility or his business or his labor connections in his official capacity without violation of privilege. Let us suppose that he used to be an olympic runner, and has maintained his interest in track as a hobby, as you mentioned. If he makes a speech about his hobby and mails that out, is that privileged?

Ms. LAWTON. He is mailing—

Chairman METCALF. You know, we are considering some legislation about whether we should take the AAU or the NCAA out of the business of running athletics, and so forth. Senator Pastore has a bill in saying we should remove the blackout of the telecast of the Redskins, because they have sold all of the Washington tickets. This business of legislation is a pretty broad thing.

Representative GIAIMO. Let me give you another example.

Right now we have an energy crisis. There are many reasons and suggestions floating around as to why there is a shortage of fuel.

Let us assume that I go home and state to a group in my city, that part of the reason for the energy crisis is that the major oil companies are trying to drive the independents out of business.

Now, I cannot prove and document this, although legislatively I may have some sort of feel either for or against that proposition, but I go out and make that speech. That could be a very damaging speech for which I could conceivably be sued by the major oil companies, could I not?

Ms. LAWTON. Yes, sir.

Representative GIAIMO. Therefore, I'd better not make the speech, except on the floor of the House.

Professor BICKEL. We are now mixing the two issues we are discussing.

One, what is your privilege under the clause as now construed in the last Supreme Court cases, and two, what kind of privilege could you legislate for yourself, and I think the answers are different.

I think in the example you gave, you would not be privileged under these cases.

I think you could certainly legislate the privilege, and the point that strikes me, I gathered an implication from what you were saying that the speech or debate clause would be the source of authority for legislating on this subject, which does not seem to me to be by any means so.

It seems to me Congress has general residual power to legislate.

If it infringes on constitutional rights, that is a stopping point, but I do not think Congress is limited in legislating on this subject by any construction of the speech or debate laws.

I do not think it is limited in legislating on this subject, anymore than it is in legislating on the law of libel as applicable in some other area.

Suppose Congress passed a statute saying that any citizen who comments on any subject that is related to a legislative matter then under consideration by Congress may not be subjected to a libel judgment unless he comments with reckless disregard for the truth, or with malice, that would seem to me to be a constitutional statute in exercise of a necessary and proper power of Congress quite unrelated to the Speech or Debate Clause, and I do not see why that should not apply to Congressmen.

I think the power to legislate here is enormously broad.

There are questions about wisdom, about how much freedom from the law of libel you want to give yourself anymore than anyone else.

We talk about John Doe of Connecticut, but there used to be a Joseph McCarthy of Wisconsin. How much freedom do you want to give him?

There were others that spoke out loud and clear, and I am not sure they should have been all that free of the law of libel, so there is a question of wisdom involved, but I think the legislative power is planetary within the limits that apply to newspapers.

Ms. LAWTON. May I ask a question. I do not propose an answer, but assuming the Congress approaches this by legislating a law of libel, in the context perhaps of the jurisdiction of the Federal courts, could we bar all State courts in hearing libel cases, no matter what the subject matter when the libel is committed by a Congressman in office?

Professor BICKEL. Obviously in setting the Federal law of libel, the power would be greater, but as it applies to the States, the question would become a question of whether Congress has the Federal power to override State law, and I think as long as it is tied into Federal interests, it may be tied into the full reach of the legislative power of Congress, subject that might be or could be of concern to Congress, which includes the spending or taxing power, and could include almost anything.

Congress I would think would have the power to override State law, in addition under cases I do not particularly favor, under which Congress may legislate to implement the first amendment.

That is a power I do not favor, because I do not like the cases that did that, but it is there constitutionally.

Chairman METCALF. Now that all the panel members have gotten into our discussion, I would like to have Congressman Cleveland get involved.

Representative CLEVELAND. I have a slightly different tack I would like to take with the panel, without getting into the merits of the cases we are discussing. One of the things that impressed me particularly after reading these cases, was the dicta or the language in the cases, that very sharply limited legislative activity. It occurred to me that the Supreme Court was operating in something of a vacuum, and they really did not understand the congressional function. Certainly my experience with Congress, and I think that of most other Members, has been that this involves the function of interceding on behalf of constituents with various agencies of the Government that are not doing what they should do, or doing something they ought not to do. It is a very important function. It makes the system of govern-

ment work in some cases. It gives the constituent who cannot afford a lawyer, accountant, or lobbyist, the representation he deserves. It also gives the Member the information, the raw material of the legislative process really, because when we do find things are not working, we do have opportunity to have hearings and legislate in that area. So I get the impression the Supreme Court was going into an area where they could not have had very many facts. I was very disappointed because they dismissed this representative function as serving as errand boy, political type of thing.

This raises the question as to how much information there is about Congress and the legislative function. When Tom Curtis—former Congressman from Missouri—appeared before the panel, he alluded to this. He pointed out that he is on a seven-man committee of the American Bar Association, which hopes to review the teaching of legislative law, perhaps encourage law schools to do more in this area of teaching about legislative law, and hoping that this subject could be better understood. So I would like to have the comments of the panel on two points. One, is whether you feel the law schools today are adequately teaching in this area of legislative law, of practice before Congress. Some people call this lobbying, but it is more than that, because Congress is operating in so many areas, that it is imperative for people to know about this. So the first question is, do you think the law schools are performing properly in this area, with the proper courses, and support? And then the second question is whether you agree or disagree in regards to the Supreme Court's very limiting decision as to what the legislative function is? We can start with Mr. Valder and go right down the line.

Mr. VALDER. Well, I am associated with a law school that has a different approach, the Antioch School is attempting to be a clinical law school from the first year with substantial Federal funds, OEO money with a teaching law firm.

We are limited as poverty lawyers, we cannot lobby on behalf of the clients.

That has posed some problems. There have been instances where full client service would have brought us up here. So to answer your question, at least at my law school, we learn less than we might about the legislative process, because we have got some grant limitations.

Now, speaking generally, I agree with you, I do not think there is enough legislation taught.

My law school was Georgetown, there was one two-credit elective classroom course in legislation.

That was 7 years ago, and I am not sure whether it has been expanded or not.

The programs that have been inaugurated at most law schools are more representational before the courts, and administrative agencies than before legislative bodies.

Representative CLEVELAND. Do you have any opinion on my second point, whether the Supreme Court—

Mr. VALDER. Yes, as far as the *Doe* case is concerned, I do not really think that Congress has been limited in its function.

As the Court's opinion says, Congress persons have a very broad scope of immunity.

I am looking at pages 6 and 7 of your committee print, bottom of page 6, the action of authorizing, and so on, down to communicative processes, and so forth, so when the Supreme Court looked at what was done in the *Doe* case, they found no problem at all with including everything done by the committee, and by its staff, within the scope of the immunity.

The only question they really raised was, did the Public Printer and Superintendent go too far in printing more copies than the statute authorized them to.

They were going beyond their statutory authorization and lost immunity by doing it, so I just do not see the *Doe* case as so important to you folks, as I do maybe to the committee staff people who get a little out of hand.

Chairman METCALF. We all know the reason we print that number is to make copies available to each Member of Congress and for distribution to interested people. For instance, we will send the stenographic report of this hearing over to the Public Printer, and he will abide by the statutes and print as many copies as are necessary.

Now, that does not mean that every Member of the House and every Member of the Senate will get an exact ratio of those copies.

Professor Bickel may say, "Look I was there for that meeting, and I want to have a seminar on this same question. Will you send me copies of the March hearings and the discussion?" So we will send him 10 copies.

Now, that is a distribution beyond the concept announced in the *McMillan* decision.

When I send Professor Bickel 10 copies, and he gives them to some of his students, does that open me—not that I worry about it—but, does that open me to prosecution?

Mr. VALDER. I think that is beginning to raise the question whether that is a legitimate legislative function.

You are getting to that line now.

Representative CLEVELAND. I was speaking more broadly than just to the decision which had to do with committee functioning.

I was disturbed by all of these cases which seem to limit our function to what we are doing here, having hearings, because that is only a small part of what Congressmen do.

The holding of office hours around one's district, and handling the mail-in and mail-out comprise an enormous amount of the workload of the congressional office.

It is in that regard that I am asking if you would form an opinion as to whether you think the Supreme Court decision was knowledgeable, based on your knowledge of Congress.

Mr. VALDER. I would say that if constituent service were the circumstances under which the next case goes up, the Supreme Court would say this is legitimate legislative functioning.

Now, that is only an opinion, because that case has not been decided, but I just cannot imagine nine lawyers and justices being so naive about what goes on that they would say constituent service is not a legislative function.

Representative BROOKS. I can imagine that, because they have done some very interesting things, and I think Congress ought to consider

the judicial system just about as carefully as they have been considering the legislative system.

I just do not know whether or not it is necessary that people who are lawyers and get appointed to the Federal bench should have lifetime jobs.

It might be that they ought to be reconfirmed, not by the House, but by the U.S. Senate every 6 years.

Professor KURLAND. May I first address myself to Mr. Brooks?

Your proposition was introduced by a constitutional amendment, by Senator Byrd, and I testified on the other side of the question.

Representative BROOKS. What did you say?

Professor KURLAND. I said that I thought this would be destructive—just as I think the problem here is a question of destruction of an independent branch of Government—I think that would be destructive of the independence of the judicial system. If you were concerned, a fixed term by constitutional amendment would be a lot better device. The judges are not subject to approval or disapproval by the Senate for the actions you have taken.

To address Mr. Cleveland's two questions. One, I do not agree with Mr. Curtis. It is quite true there may be a small number of courses labeled legislation in the school curriculums with which I am familiar. But the fact of the matter is that almost any public law course spends a good deal of time in the legislative process, what goes into the making of legislation, on amendments to legislation, on the reasons for legislation, and so forth, I agree there is comparatively little training in legislative advocacy, that is the training of lawyers to present client's positions before a legislative body, although I think some of that does take place.

Chairman METCALF. We are doing pretty well with ex-Congressmen practicing law in Washington.

Professor KURLAND. It is not limited to legislators, but the executive branch also. They seem to be doing as well.

On the question whether the Supreme Court is unduly limited in its concept of the legislative function, I think it is. I think of two things it has done. One, it has undertaken to make that definition for itself. Yet I think it is a definition that, under the Necessary and Proper Clause, belongs to the Congress rather than to the judiciary.

I think that they—the justices—have taken a narrow view, not of the problem of approaching administrative agencies and old-line agencies, but rather in terms of dissemination of information to the constituency.

Certainly I think that the Congressman from New Haven's constituency is not only the people in New Haven who elected him, but that in the House of Representatives in the U.S. Congress, his constituency is at least in part the entire Nation.

So in filing the brief on behalf of the Senate, we did not go into the problem of the information functions essentially because Mr. Gravel's brief, and the record, his supplementary materials in the record, are quite extensive on the information functions of Congress, including the mail-in and mail-out, and the distribution of the publications of both the House and the Senate. It was not a lack of data

available to the Court, so much as a decision apparently not to utilize that data, or not to accept the data as a demonstration of what the legislative function is.

It was there that I think the Court exceeded its bounds in saying, we will tell you what the legislative function is, although it is quite clear from the congressional behavior over a long period of time now that the Congress has assumed the function is dissemination of information, and not merely through official publications, this is a legislative function, and all legislators, national legislators have engaged in this function for some time.

To that extent, I think the Court was in error. I have to plead the same deficiencies that my fellow panelists have, by saying I was an advocate in the *Gravel* case, and felt strongly about it at that time, and I think I still feel strongly about it.

Representative CLEVELAND. Could I have the other comments?

Ms. LAWTON. As far as law schools are concerned, there has been considerable improvement in recent years with the emphasis on more practical application of the legal training, but I think perhaps State legislatures could do more as could the Congress in cooperating in clinical programs.

The best and more experienced legislative expert in the world cannot teach of course quite as well as perhaps serving a semester, as a law clerk assistant, member of the counsel's office, whatever it is, on the Hill.

Also, there are State legislatures in every State. It may be that they could do more in cooperating with clinical programs or summer internships, or whatever it happens to be, but there is no better place to learn about the Hill than being here, and I assume that is true in State capitals.

In terms of whether the Court understands the legislative role, it seems to me that the Court does understand the role of Congress, but it is saying the Speech and Debate Clause covers less than that, it covers the function of legislating, which is only one function of the Congress of the United States, and I think perhaps it is an interpretation—

Representative CLEVELAND. But you cannot legislate without facts.

Excuse me. I must admit that Congress can and often does, but should not do so without facts. And how do you get facts? You get them from situations.

The thing is that at least this process is one source of facts. If you sit and wait for the lobbyist to bring you the facts, I do not consider that to be satisfactory.

Factfinding should be in dealing with the agencies, with one's constituency, and in reference to a particular case. Often, that particular case comes to you through your mail. Oftentimes when a constituent complains to you, it may be the beginning of a chain of events which puts that legislation in motion. But that is excluded from this immunity, as I understand the Supreme Court decision.

Ms. LAWTON. Yes, but I do not think it is a lack of understanding of how the Congress functions.

It is simply the Court saying, what the Speech and Debate Clause is meant to cover, is the formal process of legislating.

Now, you can argue whether that is right or wrong.

Representative GIAIMO. What do you mean by the formal process of legislating?

Ms. LAWTON. The introduction of the——

Representative GIAIMO. In other words, from what Professor Kurland says, the Court is now beginning to constrict the definition of legislation.

I do not know whether you intended that or not, but that is the way I understood it.

Chairman METCALF. The Court is constricting the definition of what is a legislative act to activities within the very Halls of this building.

Representative GIAIMO. The formal manner of legislating is not so easily defined.

If I want to legislate some energy legislation, it is just not getting up on the floor of the House and making a speech.

The practicalities of the democracy we live in is that you have to generate support, and so forth; therefore, you go out and make speeches and try to generate support for public awareness and support for certain types of energy legislation, and I make the statement I mentioned before. I think that is part of my legislative duty and function, but it is not being made on the floor, and yet——

Ms. LAWTON. I am not disagreeing with that.

Representative GIAIMO. The Court is narrowing that, so you say?

Ms. LAWTON. I think they are reading the words speech and debate not quite that literally, because the Court clearly has read it to include hearings, and votes, which are not, in technical English speech and debate, but they are not saying the other is not a proper role; they are saying these words mean such and such a thing.

That is the distinction I am trying to make. I think they understand the role, but there is this interpretation of those words.

Representative CLEVELAND. Could we have your wrap-up on this?

Professor BICKEL. On the teaching of legislation in the law schools, I think there is less than there ought to be.

When I was in law school in the 1940's, there was a course that Henry Hart gave us at Harvard entitled Legislation, and it was similar to a seminar under that title given by Felix Frankfurter, and it did attempt to teach more about drafting and about the true operation, the realistic operation of the legislative process. But I would be opposed to launching clinical programs.

I think it is a wonderful thing to spend a year on the Hill, but I think a man can do that after he has his law school degree.

I would favor, and a number of us do favor some recruitment of people who do not have only the classic law firm and law clerking experience, but who have legislative experience as staff counsel, or committee counsel, or what have you.

I think a good bit can be done in that direction, and I would favor doing it.

I come to the other half of the question with an open mind. I have not committed myself as an advocate.

Chairman METCALF. That is pretty difficult for a lawyer.

Professor BICKEL. I just do not happen to have been retained in any of these cases.

I first of all read the opinions a little more narrowly than they have been read.

I do not see the Court as having launched itself upon some authoritative definition of the legislative process.

They were deciding two cases. One was a bribery indictment, the other one was a very peculiar set of facts of an attempt to get private publication of a book only part of which was derived from congressional hearings. And they said in those two cases, what I think is their duty, and unavoidably their duty, what the rock-bottom minimal constitutional protection is or can be.

In my judgment, they came out pretty well right, I think, and if more needs to be done by way of protecting Congressman Doe of State *x*, then it seems to me that Congress is in a position to do it. Far from having given to itself the function of defining for Congress the legislative function and the immunities attendant upon it, it seems to me the Court quite properly through the decision threw the ball back to Congress, having told Congress what the Constitution itself does, and I think in the context of those two cases, having said it pretty right.

It does seem to me that so long as you do not go into motives, you ought to be able to punish the taking of a bribe, and it does seem to us wide-ranging private publication of materials should not constitutionally be included in what is immune. If one wants to immunize that kind of activity, I would think that it would have to be done by a statute that is fairly carefully drafted, and has in mind, not only the *Senator Gravel* case, but the late Senator McCarthy, and Congressman Rankin and others who have abused congressional privilege. So I think the ball is in your court.

Representative CLEVELAND. I think you may be right, and maybe Congress will have to legislate. But it will be a difficult area in which to legislate.

Professor BICKEL. Indeed it will, and a more difficult area would have been to make wide-ranging constitutional law.

I am rather glad the Court did not attempt to do that.

Representative CLEVELAND. Let me get specific before I quit on this question.

It is well known that Members of Congress engage in activities other than the purely legislative activity, which nearly all protected by the Speech and Debate Clause. They include a wide range of legitimate efforts on behalf of constituents.

They are such things as the making of appointments with Government agencies.

Now, getting back to what I said previously, I do not see how you can legislate in a vacuum. Until you have been up against one of these agencies, and have experienced problems with the agencies, you don't have the facts from a representative or legislative standpoint. Take, for example, the Federal Highway Administration, something I happen to know about; their rules and regulations in land damage cases and the taking of land were woefully antiquated.

A road would go through, and a business would be bought, but there would be no compensation for lost business, and no compensation for moving the business, just for the raw value of the land.

Now, as I go to the agency, hammering on the door down there, trying to get decisions on behalf of a constituent, is not that a legitimate legislative activity?

Professor BICKEL. Absolutely, Mr. Cleveland. And I think that passage has a sort of offhand tone to it, which is regrettable, for example, the word "errand" is certainly an ill-chosen word. But I do not think that passage decides anything.

That is a dictum thrown in; it has nothing to do, I forget whether it is *Gravel* or *Brewster* we are reading from, it had nothing to do with—

Chairman METCALF. It is in the *Brewster* opinion.

Professor BICKEL. *Brewster*, with the decision of the case.

Mr. Brewster was indicted for accepting money for what the court fully agreed was legislative action, it was just that, and they held you can convict him of bribery so long as it is not necessarily a part of the allegation of the indictment or the facts to be shown at the trial that you question his motive.

Representative CLEVELAND. Sitting right there, you pointed out exactly why it is going to be so difficult to legislate in this area, because, as you said, this is a case where a Senator took a bribe. That does not sound very good, and then when it comes out we are trying to write legislation to change that case, it will come out in print that what we are trying to do is make bribery legal.

This is difficult both in substance and politically, but the Court does not sit to save us from the more difficult and nasty parts of our tasks.

The fact that it is rather difficult to do it by legislation is not an argument for having had this done by the Court in the name of the Constitution.

Professor BICKEL. Yes. In fact, the argument cuts the other way.

The more difficult it is, the more it needs fine tuning, the less suited is the Court to do it, and the more suited you are to do it.

Chairman METCALF. Professor KURLAND.

Professor KURLAND. Mr. Bickel's treatment of the *Gravel* case would make it a very narrow and limited decision.

His treatment seems to me to be totally inconsistent with the last substantive paragraph in the court's opinion—the opinion in effect defines the privilege quite narrowly.

Representative CLEVELAND. What page are you on?

Professor KURLAND. Ninety-three of your committee print—by saying what is the very narrow privilege as the Court has read it.

[The material referred to is the reprint of the texts of the opinions of the Supreme Court Justices in the case of *Gravel v. United States* in the Special Report of the Joint Committee on Congressional Operations Identifying *Court Proceedings and Actions of Vital Interest to the Congress*, June 29, 1972, p. 93, which is as follows:]

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if

any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.¹⁷

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee;¹⁸ (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

¹⁷ The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

¹⁸ Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the executive branch.

In this regard, I think you may have been thrown slightly off track by a concern about libel suits which I think is a real concern. But you have to remember that *Gravel*, which you were concerned with, is about the power of the executive branch of the Government to summon a legislator, or legislative aide, before a grand jury for purposes of getting him to reveal data, about his principal's behavior in the legislation.

Professor BICKEL. Would you read subparagraph four, which seems to me quite possibly to cover what Mr. Cleveland is worried about.

Professor KURLAND. It says it would perform ample protection of the witness, and then four, except, this means they can question.

Professor BICKEL. Except as it involves third party crime.

You protect him from being questioned about any act in itself not criminally performed by the Senator or his aides in preparation of the Senate committee hearing.

It seems to me that is ample protection. He can go knocking on the door of the highway agency.

I do not read the case as saying in the appropriate instance in which you want immunity in knocking on the door of the highway agency—

Professor KURLAND. The immunity is limited. That is the problem.

I do see the problem essentially in terms of *Gravel*, that there is the power of the executive branch of the Government to summon aides of Congressmen and Senators for purposes of having them reveal to a grand jury the relationships that they have had with their Congressmen and Senators. And I think that is the basic problem as created by *Gravel*. And it cannot be avoided by—I should not say that—but I think it can be avoided if the Congress undertakes to describe specifically in legislation, as I think Senator Ervin has suggested, the capacity of the grand jury to summon such a person.

Representative CLEVELAND. Professor Bickel, just one more point. You may feel I am unduly alarmed about this situation, but we did have one Member of the House, who, following a series of accidents involving a charter bus in which several of his constituents' children were riding cross country, found out from the Bureau of Motor Carrier Safety downtown that one of two buses on the trip could have been in violation of some safety regulations. In a previous situation, a bus under the same ownership was involved in an accident in which seven children were killed. The Member made public the safety reports and was sued by the bus company. They wanted him to suppress this information. Although the New York courts decided in his favor, again, there was, I think, a \$10,000 or \$12,000 legal tab facing the Member.

Representative GIAIMO. It was much more than that. He has been up and down, to the appellate division, I think to the Supreme Court of New York, and it will probably be in the Supreme Court of the United States before it is over.

Chairman METCALF. Gentlemen, we can never stop people from instituting a lawsuit.

Representative CLEVELAND. I just want to give one factual situation.

Representative GIAIMO. We cannot stop people from instituting a lawsuit, and Mr. Cleveland just mentioned a particular case that is pending at the present time.

This is the thing that disturbs me. As I stated earlier, I was involved in several similar lawsuits where we made a motion for summary judgment—which is the easy and quick way out of this—and we made allegations saying the affidavit states the matter of law that the statements combined are true. Naturally, we would claim that, although it was never debated because the summary judgment was granted—the utterings of said statements by the defendant, Member of Congress, were absolutely privileged, and we are not saying them on the floor, and the statements were made without actual malice, and the statements of a public figure may not be challenged without constitutionally sufficient evidence of actual malice.

The Court granted a motion for summary judgment by the defendant.

Now, what I am worried about is as a result of the *McMillan* case. Do we still get a summary judgment, or do we have to go in and prove truth or absence of malice, and so forth?

Professor BICKEL. So far as you were granted a motion of summary judgment at least on your third claim, that you were privileged because the defendant was a public figure, you were in under the *New York Times* case.

Representative GIAIMO. Let me get back to Ms. Lawton.

Suppose I go out next week and make a statement that I think part of the reason for the energy crisis is because the major oil companies are out to crush the independents.

You stated earlier that you think that might be libelous.

Ms. LAWTON. I was not commenting it was a libelous statement.

Representative GIAIMO. Then they could bring suit.

Chairman METCALF. The question is whether they could recover, not whether they could bring suit.

Representative GIAIMO. The question I am interested in is, do I have to go through a lengthy lawsuit, or is the Court going to throw it out on a summary judgment, because of the fact I am speaking within my powers as a Congressman?

That is where we feel there has been an infringement or a restriction of our legislative capacities.

Chairman METCALF. Let us get Mr. Valder back into the discussion.

Mr. VALDER. I think it is still a question of law as to whether the acts done were legislative, such that it is appropriate for summary judgment determination.

The *Doe* case did not change that to make it a jury question.

Whether or not it was done within the scope of legislative activity, however defined, will still be a question for the judge to answer as a matter of law.

The *Doe* case will be remanded, and we will see if it is going to be treated as a question of law, if there are any elements that have to go to a jury, but I think for the time being, you can assume it is still a question of law.

Representative GIAIMO. Then we get back to the original concern of this committee which was raised by Professors Kurland and Bickel, that is, are the recent decisions making changes in established law? The *Brewster* case, after all, was much different from the decision that Justice Harlan had handed down in a prior case with which I happen to agree.

I think that was the *Johnson* case. Let us put it right to the Department of Justice. Are we witnessing an attempt by the executive branch to confine the historic privileges which we had, and which, as a result of the *Brewster* case and the *Gravel* case, are now causing us concern that we are not quite as free from intimidation as we have been in the past?

I wish you would comment on that.

Ms. LAWTON. The distinction between *Brewster* or the decision in *Brewster*, and the decision in *Johnson*—

Representative GIAIMO. You prove the bribe without getting into the question of the speech on the floor.

Ms. LAWTON. The Congress itself had said Members of Congress are prosecutable in Federal courts by the Executive for this offense.

That was Congress' own judgment that it was a prosecutable offense.

Representative GIAIMO. That is the statute?

Ms. LAWTON. That is right.

Representative GLAIMO. But in order to prove that prosecutable offense, you had to go into the speech of the Congressman on the floor, which you are prohibited from doing, as I understand it, by the Speech or Debate Clause of the Constitution.

That is the distinction.

Now, it is my privilege to disagree with the majority decision. I am curious as to your opinions of whether or not you think this is the beginning of a constriction of the privilege which we had before, because up until that decision, if you will recall, the decisions of the *Johnson* case and even the lower courts in the *Brewster* case were sustaining our position. So that we do have a very definite change as a result of the majority opinion of the Supreme Court.

Now, is this a change, and is the result there one of a constriction of the immunity clause in the Speech or Debate Clause of the Constitution?

Ms. LAWTON. I think you could make a good argument there was not a change.

There were peculiar parts of the *Brewster* case, and I understand the Government argument to the court which was ignored by the majority, was that there was a waiver by Congress.

Also, it was not necessary to prove the speech. I think that *Brewster* and the *Johnson* cases are not necessarily inconsistent.

There is language in the opinions that seems to be heading in opposite directions, but I do not think the opinions are necessarily inconsistent and I do not think it marks a great constriction.

Chairman METCALF. Would you yield just a moment?

Senator Helms has a little bit different point of view. He is here with us now.

I am going to try to get this room for the remainder of the day. If the panel is agreeable to carry on this dialog this afternoon, can you come back then, Senator?

I would like to have you talk to them.

Senator Helms, in his statement of his individual views filed at the opening of this discussion, felt that the Court is expanding rather than constricting the powers, and I think it would be useful to discuss that.

Professor BICKEL. Mr. Chairman, I am terribly sorry, I cannot be here.

Senator HELMS. If the gentleman would yield, I have a 12 o'clock appointment that I must keep.

Let me say to the distinguished members of the panel, I am the "other" Senator from North Carolina.

I am not a country lawyer, I am not even a lawyer, but I think somebody ought to raise the question, why should I as a U.S. Senator not be held responsible for libelous statements I make off the floor of the Senate, under whatever circumstances?

Second, why should I not be held responsible for any untruthful statement, like any other citizen of this country?

Additionally, is not the Constitution silent as to the "constituent service," so often referred to?

Now, I have been an administrative assistant to two Senators, and I am now a U.S. Senator myself.

I have dealt constantly with Federal agencies, and in each dealing, I have been conscious that there is a right way to do things and a wrong way.

I think as an assistant or as a Senator, I ought to be held responsible for the judgments I make.

Is it possible that it is the course of wisdom, for each Senator and Representative to decide for himself or herself what constitutes legislative process, and to pay the penalty for an error of judgment, and certainly for a violation of integrity?

After all, this is what is required of every other citizen in this country.

One particular thing I like about being on this committee, my colleagues will allow me to sit and disagree as strongly with some of the others as I have done.

In the case of Senator Gravel, who is my neighbor in the Senate Office Building, and to whom I am devoted, he made a judgment in the Pentagon Papers affair.

Many admire him for it, but I think he ought to be willing to stand up to that judgment, to defend it, and to take the consequences if he is wrong.

I think the Constitution does enough when it limits our immunity, when the Constitution limits our immunity to what we say and do on the Senate floor.

Now, I will leave and let you discuss that, and do not throw anything at me as I leave, Mr. Chairman.

Chairman METCALF. If you do not mind, we would like to pursue some comments on the points you have raised.

Can we have some comments from the members of the panel?

Let us start with Professor Kurland. He participated in the *Gravel* case.

Professor KURLAND. Let me talk about several things. On the question whether a Senator or Congressman should be held responsible for his activities as a Senator or Congressman, my answer is I certainly think they should. But the real question is: To whom, to the executive branch, to the judicial branch, or to the legislative branch?

There is a possibility of drawing a distinction between criminal actions brought by the Government and libel actions brought by individuals.

Chairman METCALF. It seems to me we should emphasize that you are responsible to the executive branch in one area and you are responsible to individuals enjoying certain constitutional rights in the other area.

Professor KURLAND. I would point out Mr. Bickel has raised the name of a late Senator from Wisconsin from time to time.

It was ultimately the Senate of the United States which imposed the responsibility on him which lots of people thought should have been imposed, and your fellow Senator from North Carolina played a role in that too.

I do think that one of the possibilities in response to the question is the responsibility ought to be on the House of which a legislator is a member.

Second, when you talk about the liability for truth, that every citizen of the country has, it is certainly true that every citizen has a liability.

It is also true that truth is not a requirement for publication by newspapers, and it seems to me, the same reason for immunity to the press is cause for immunity to Senators and Congressmen when they are making public statements. The limited immunity of making statements that are not malicious.

I do think that a legislator, as every Government official these days, has extraordinary burdens. And this is true of national legislators. One of the things you have to balance, one of the things you have to recognize, is that he is not like every other citizen. He has representative duties as a representative which I think would be interfered with, which might make his performance and function impossible, if he were required to respond without immunity for every remark made outside of the well of the Capitol Building.

That is what I think. And again I would remind Senator Helms that the Senate brief in *Gravel* was different. It was a brief attempting to protect the legislative interests rather than the particular activities that Senator Gravel engaged in during the course of events which gave rise to that litigation.

Chairman METCALF. Your brief is in our hearing record.

I know that Congressman Giaimo wants to get into this discussion. Before I yield, I would like to have comments from the other members of the panel.

Professor Bickel, go ahead.

Professor BICKEL. I might say I am more sympathetic to Senator Helms' point of view than Professor Kurland, but I do think he defines too narrow an area of protection. I think the Court probably construed the Constitution about where it properly ought to have been construed, but we are talking also about what would be wise by way of legislation, and I would think that to narrow the privilege to the point that Senator Helms suggests, would be to constrain and restrict the representative function more than I would think desirable.

I am not sure that I am, in fact I am sure I am not, quite able to approve how far the court has gone to protect newspapers.

I am not at all that enthusiastic about how far the law has gone in this direction.

Perhaps something a little less than reckless disregard of the truth and malice would be well enough to allow a case to go to the jury, and I think I would favor holding Members of Congress to the same standard, but to impose on you a rule of truth, and otherwise responsibility to the extent that you negligently misstate the truth, would seem to me to create an atmosphere of constraint about you, that probably would inhibit your proper legislative function.

One final point. I do not have as much faith in self-regulation by Congress as Mr. Kurland seems to be able to summon.

Yes, they did get Joe McCarthy by and by, but after a long, long time, and then with a mild rap on the knuckles.

Professor KURLAND. Before the courts did though.

Professor BICKEL. But under a state of law, he was careful about going out and subjecting himself to libel suits.

I think the expectation that the Houses of Congress can be relied on effectively to discipline their Members is about similar to the expectation that prosecutors can be expected to effectively regulate themselves, and the police department can be expected to regulate itself.

Certainly in gross cases, one can expect each House to act, but it is a little too close to home, and I see no objection to applying a well-framed statute to Congress, to Members of the Congress through the normal judicial process which is impartial, and which I do not think that Congressmen under a well-framed statute would fear any more than others.

Senator HELMS. I must leave. I do appreciate your letting me have my brief say.

Let me emphasize as I leave the room, that, what I think this country needs is more discipline in truth and not less, and that applies to Senators and Congressman and executive people and judges.

Chairman METCALF. And to CBS.

Senator HELMS. Particularly CBS.

Thank you very much, Mr. Chairman.

Chairman METCALF. Would you mind if we go on with some comments?

Senator HELMS. I would appreciate it, and I will read it with great interest.

I am sorry that I have to leave.

Chairman METCALF. Ms. Lawton.

Ms. LAWTON. I think the liability of members has to be distinguished somewhat as to speech and conduct, between the two, and the courts seem to have done this, or suggested it to some extent.

Matters said in debate are absolutely privileged under the Constitution, and the courts have recognized that.

I do not think the courts have recognized that debate which takes the form of a fist fight as privileged, and I really do not think it should be.

Chairman METCALF. Well, we now have rules against that.

Representative GIALMO. Along the lines of comment that Professor Bickel made, as a practical matter, part of the problem is that the Congress does not police itself as well as it should, and I agree with that, but I think the question that arises in all of these situations is if a wrong has been committed, as it was alleged and found in the *Brewster* case, who should do the punishing. Should it be the court or should it be the Senate itself, and maybe we have to strengthen our machinery to punish Members.

Second, there is another inhibition upon us as elected officials, and that is the electorate back home that is supposed to keep us in mind so that if we commit wrongs, we are not going to be here; is not that so?

Professor BICKEL. Well, yes, in some measure, but I think Mr. Kurland was right, when he indicated before, that your constituency is really the country, and reliance on the smaller constituency to exert discipline in the national interest is often misplaced.

There are relations that develop between representatives and constituents, the city of Boston with Mayor Curley, there was the case of his election when he was in jail, it was a very amusing episode.

Chairman METCALF. Mr. Langer of North Dakota was elected while in jail.

Professor BICKEL. J. Parnell Thomas of New Jersey was properly punished by the electorate.

Representative GIAIMO. Adam Clayton Powell was reelected after conviction.

Chairman METCALF. Let me interrupt for a moment at this point in the record in order to call attention to an article from the Fordham Law Review on Congressional Self-Discipline. It discusses the history of various cases of exclusion, expulsion, and censure of Members. I wanted to include it at the end of today's hearing, but will refer to it while we are discussing this issue so that anybody reading our record can turn to it.

Professor BICKEL. I cannot see why we should fear the application of the judicial process to Members of Congress that would come under a well-drafted statute.

Representative GIAIMO. When you read the *Brewster* case where the allegation was a bribe, it seems to me there were concerns of Members of Congress as to the difference between a bribe and a legitimate campaign contribution.

Is it what the Department of Justice decides it to be?

Professor BICKEL. That is a legitimate problem.

Representative GIAIMO. How do we cure that?

How do we know?

You do not get campaign contributions from your enemies. You get them from people who agree with your philosophy of legislation.

Professor BICKEL. It is notorious that campaign financing is a messy field that needs attention, and all you are demonstrating to my mind is that much better legislative effort is needed in that area than now exists, and the same thing holds for conflicts of interest, which is another disaster area.

Those are some of the problems. What you are raising is a substantive problem area.

Professor KURLAND. I would like to ask Mr. Bickel a question.

He seems to think that a neutral activity of the judiciary would be adequate with regard to congressional behavior, but I think he does not think that that neutrality is sufficient to suggest they ought to have control over the newspapers.

Professor BICKEL. I thought I said a moment ago, it seems to me the *New York Times* versus *Sullivan* doctrine has been carried too far.

I would have no great concern about a law of libel that stopped well short of where they got, which is Metromedia.

Professor KURLAND. Let me refer to a case with which you do have some familiarity, and that is the second *New York Times* case, to which the question was whether sanctions could be imposed on a newspaper for doing exactly what Senator Gravel is charged with, which is the publication of the Pentagon Papers, which is the question that the grand jury in Boston was investigating Mr. Gravel.

Professor BICKEL. Nobody proposed punishing Senator Gravel for exercising his constitutional function in publishing the Pentagon Papers, namely reading them off that evening.

I would add to that, I agree that injunctive process ought never be available against Congress, and injunctive process was what was attempted to be imposed against the New York Times.

But the *Times* case, I did not argue that the *Times* was necessarily free of all liability, as it would have been. I believe but the case did not decide it.

Second, the real comparison is between what the *Times* did in the exercise of its protected constitutional function which is the first amendment function of publishing, and what Senator Gravel did in the exercise of his protected constitutional function, and both were protected.

If the Beacon Press had been subjected to injunctive process, it would have been protected.

All the *Gravel* case involved was the issuing of subpoena to ask him about something that might have resulted in criminal rather than equity action against the Beacon Press, and he resisted the subpoena.

Neither the *Times*, nor Earl Caldwell, nor Mr. Branzburg, or others who are reporters are under the law entitled to resist subpoenas, although I should disclose, I filed a brief there, and I thought they ought to be in some measure protected.

Professor KURLAND. That is really what I wanted to get in the record.

Professor BICKEL. All right.

Professor KURLAND. In terms of what this committee should recommend as legislation, do you think it would not be appropriate to suggest exactly the same immunity. The immunity the Congress has, that Congressmen and Senators have, should be the same immunity that is now available under the first amendment to the public press.

Professor BICKEL. Yes. I would think so. I regret the length to which the Constitution has been made to go in that area, but it is there, and I would put Congress in the same position as the press, and that is the way I would frame it.

You have other problems, there is the question of a statute dealing with the problem of bribery, with attempting to differentiate between campaign contributions and bribes.

There is ample room for legislation which Congress has never brought itself to address about the distinction between knocking on the door of the highway department on behalf of a constituent, or in search of information on the one hand, and bringing, as has not been unknown to happen, improper pressure to bear on an administrative agency on the other hand.

That is another thing that Congress could very well legislate on.

It is not an easy problem, but again, that makes it, that is the reason they are legislative rather than judicial problems.

Chairman METCALF. I understand you have an appointment, Professor Bickel. We would like to keep you as long as we can.

Professor BICKEL. Well, it is right in this building.

If I may, I will slip out.

Chairman METCALF. Please stay as long as you can.

We are concerned in this inquiry with yet another question that I think has not been treated.

In the doctrine of separation of powers, of course, the Speech or Debate Clause affords protection to the legislative branch in its relations with the executive and judicial branches.

Therefore, an action instituted by the Justice Department, an executive branch department, raises quite distinct issues, as I understand it, from an action brought by private citizens against a Member of

Congress, for actions he or she has undertaken in an official capacity.

Now, is there not a distinction, and would not that answer some of the questions that Senator Helms raised?

We have to protect Congress from somebody sending a U.S. marshall up, and saying: Look, you called up the highway department, and that was illegal, and that was bribery, and bringing undue influence. We are going to haul you off to jail. That is quite different from the kind of situation described by Mr. Valder, where a congressional publication was alleged to be injurious to his client and a civil suit was filed to stop its distribution.

Is there not a difference?

Ms. LAWTON. There is some debate as to whether the speech and debate clause rests on separation of powers, particularly since it grows out of a system that did not have that, but this is an historical argument. If you pose separation of powers as a basis for drawing broader immunity lines as against the private citizen, you still have not solved the problem of what you do with the State. In our system, the State Governor or the State prosecutor does not appear, so you cannot say it is a violation of separation of powers, as we understand that phrase, for the State to prosecute for bribery. Using separation of powers as a basis will not solve the problem.

Professor BICKEL. For Adam Clayton Powell, I guess it was a civil case. He ended up with a huge money judgment, in the State courts of New York, and in not paying that judgment, he was subject to criminal prosecution to make him pay.

It was not a question of executive as against Congress, but certainly it was pressure brought to bear on him.

Mr. Chairman, if I may, I would like to slip out.

Chairman METCALF. I learned from my colleagues that we cannot have a session this afternoon and I have a vote coming up in the Senate, so we will bring this to a close. Congressman Dellenback, who is very much interested in the subject of this inquiry, was necessarily absent this morning because of the markup of the Land-Use bill in the Interior Committee. He had requested that some questions be raised with the panel, so, if the panel members are agreeable, I will have the staff send supplemental questions to you for your response. I will make such questions and responses a part of the hearing record.

[The supplemental questions and the responses of Ms. Lawton to the questions appear in the Appendix, beginning at page 178, *infra*. Responses were not received from the other members of the panel.]

Professor BICKEL. Certainly, Mr. Chairman. I have appreciated the opportunity to be here.

Chairman METCALF. We have a vote on the minimum wage in the Senate. Would you respond as far as your view of civil rights is concerned? There is a constitutional question raised as to whether or not we can pass a law that would exempt us from immunity that would involve or infringe upon the rights of privacy that you raised in the *McMillan* case.

Mr. VALDER. I think I would like to tie several things together with part of the Constitution that has not been discussed, the bill of attainder clause. We raised the point, but the Supreme Court chose to limit its discussion to speech and debate, but in my view, and this picks up on what Senator Helms said, I make a distinction between Congress as a

unit and the individual Congressmen, I view powers and infringements and rights a little differently, when you look at Congress as a group.

What happened in this case, this was not an individual Congressman, this was Congress exercising some collective power in the *Doe* case, it goes all the way to the point where the full House voted to print a report.

Now, that seemed to us to get to institutional activity, something Ms. Lawton was mentioning.

It was an activity kind of thing. We raised the question and alleged this as a violation of the bill of attainder clause and on this independent ground there is a constitutional remedy apart from a first amendment right of privacy ground, and I would suggest the bill of attainder clause may be a jumping off point for legislative activity.

It is certainly smack in the middle of this area called libel and slander, and that is what this clause was attempting to preclude. The U.S. Constitution prohibits two kinds of bills of attainders, not only as to the Federal legislature, but also as to State legislatures. This clause may be a jumping off point with regard to the question of libel.

There were five or six Supreme Court decisions, and the last one was a long time ago, but as defined, the bill of attainder is a legislative act that inflicts punishment without judicial trial. So that is my first point, and I think you can get some legislative ideas there.

The other point, in response to questions Mr. Giaimo raised, you should be aware that the Department of Justice ducked out of the *Doe* case.

I do not know whether too many people know that, and it is important.

The Department of Justice argued successfully in the lower court in the *Doe* case, that immunity was very, very broad, and then lo and behold, they argue up in New England, in the *Gravel* case, that immunity is very, very narrow, and at that point, we pointed out the inconsistency, and the Solicitor General elected not to go further with the *Doe* case, and private counsel were retained.

I wish Senator Helms were still here, but to me that indicates a separate problem, and that is that you have executive branch involvement in cases of private citizens alleging violation of constitutional rights.

It is what the Justice Department lawyers were defending, which raises still another question about the separation of powers problem.

We had the potential problem of having a separation of powers there simply because of who was defending the defendants.

Chairman METCALF. Did you raise that question?

Mr. VALDER. In our petition for certiorari, we pointed that out, in that it seemed to us there was an argument made in the lower court which succeeded, which may not be a current argument anymore in light of the *Gravel* decision and position taken by the Justice Department in that case.

At that point the solicitor opted out of the case, and the Department of Justice attorneys no longer participated. Former Congressman Bill Cramer from Florida represented the committee along with other attorneys.

Chairman METCALF. I was sued in the District Court of Colorado along with some district judges, and the head of the prison, and so forth. The U.S. district attorney of that district represented all of us.

Now, do you feel that is a violation of the separation of powers?

Mr. VALDER. I think there are some problems there. I cannot tell you all of the implications, but it brings to bear the force of another part of the Government, and while it may not be a conflict between two branches, I think the separation of powers goes the other way, too, that sometimes one branch cannot jump on the other's bandwagon to support them in a suit, especially by private citizens.

Chairman METCALF. I am awfully sorry. I have 5 minutes to make a rollcall on an important amendment on the minimum wage.

This has been a most useful dialog. I think it has been very helpful. I wish we could continue it throughout the afternoon. I thank you all for coming. I am going to have counsel submit some additional questions to you, and your answers will be incorporated and made a part of the record, along with expansion and elaboration of any of the remarks that you have made.

We have received a statement from the American Civil Liberties Union, filed on behalf of Burt Neuborne, the assistant legal director. Without objection, this statement will be included in the hearing record at this point.

[The statement follows:]

STATEMENT OF BURT NEUBORNE, ASSISTANT LEGAL DIRECTOR, AMERICAN
CIVIL LIBERTIES UNION

I wish to thank the committee for the opportunity to present the views of the American Civil Liberties Union concerning the scope and effect of the immunity granted to Members of Congress by the speech or debate clause of the Constitution.

Briefly put, we believe that the immunity from judicial review afforded by Article I, Section 6 operates broadly to insulate Members of Congress from the threat of criminal charges leveled by a hostile Executive in an attempt to silence or intimidate a critical or disfavored legislator. Indeed, Article I, Section 6 was designed precisely to prevent the occurrences which culminated in the, in some ways, unfortunate decision of the Supreme Court in *Gravel v. United States*, 408 U.S. 606 (1972).

On the other hand, we believe that the speech or debate clause does not insulate members of Congress from judicial review of allegations that their actions impinge upon an individual citizen's fundamental constitutional rights. Thus, for example, we believe that Article I, Section 6 would not preclude judicial review of the constitutionality of subpoenas issued by Congressional committees requiring the production of the membership lists of lawful, albeit controversial, political associations.

I. THE CONSTITUTIONAL TEXT AND ITS HISTORICAL BACKGROUND

Article I, Section 6 of the Constitution provides that Members of Congress:

"* * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other place." [Emphasis added.]

The incorporation of the Speech or Debate Clause into our Constitution was designed to protect the Legislative branch from the systematic harassment to which the English Parliament had been subjected in the century preceding the accession of William and Mary to the throne in 1689. In fact, the wording of Article I, Section 6 is directly traceable to a parallel provision contained in the English Bill of Rights of 1689.

During the struggle between the Crown and Parliament which preceded the adoption of the Speech or Debate privilege, the Executive systematically resorted

to politically motivated criminal prosecutions against recalcitrant legislators to crush parliamentary opposition. The prosecutions were, of course, initiated by Executive officials appointed by the Crown and were also heard and determined by judicial officials appointed by—and often highly subservient to—the Crown. The result was a potent *in terrorem* device to stifle legislative dissent. The use of *in terrorem* prosecutions reached its apogee with the initiation of prosecutions charging seditious libel and conspiracy to delay adjournment against three members of the House of Commons. 3 How. St. Tr. 294 (1629). It is generally agreed that the major purpose behind the adoption of the privilege was to disable the Executive from utilizing such *in terrorem* prosecutions. As Mr. Justice Harlan noted:

"There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause," (*United States v. Johnson*, 393 U.S. 169 (1966)).

It is against this historical background that current questions concerning the scope and meaning of the Speech or Debate Clause must be considered.

II. JUDICIAL INTERPRETATION OF THE SPEECH OR DEBATE CLAUSE

A. *Pre-Brewster, Gravel & Doe*

The Speech or Debate Clause has been construed by the Supreme Court on eight occasions. *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Johnson*, 383 U.S. 169 (1966); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (1972); *Doe v. McMillan*, 411 U.S.L.W. 4752 (May 29, 1973).

In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the Sergeant-at-Arms of the House of Representatives executed a resolution directing the arrest of a named individual. The Supreme Court rejected Thompson's contention that his actions in executing the resolution of Congress were immune from judicial review under Article I, Section 6.

In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Supreme Court ruled that the Speech or Debate Clause did not bar judicial review of allegations that the counsel to the Senate Internal Security Committee had engaged in an unlawful conspiracy to violate an individual's Fourth Amendment rights by seizing his records for Committee use.

In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court ruled that the Speech or Debate Clause did not preclude judicial review of the enforcement of a Congressional resolution barring Adam Clayton Powell from Congress.

However, in *United States v. Johnson*, 383 U.S. 169 (1966), the Supreme Court ruled that the Speech or Debate Clause barred the introduction of evidence concerning the preparation of and motivation for a speech on the floor of Congress in a criminal prosecution for alleged bribery.

Thus, prior to *Brewster*, *Gravel* and *Doe*, the Supreme Court had consistently permitted private persons to seek judicial review of agents of Congress engaged in executing Congressional resolutions, but had refused to permit the Executive to initiate criminal prosecutions against members of Congress arising out of the performance of their Congressional responsibilities. Such a formulation carried out the historical purpose of the Speech or Debate Clause by protecting Congress against a potentially hostile Executive, while protecting individuals against potentially irresponsible Congressmen.

B. *Brewster, Gravel and Doe*

However, the decisions in *Brewster* and *Gravel* permitted the Executive, for the first time in our nation's history, to instigate criminal charges against members of Congress arising out of the performance of their official duties. And the decision in *Doe* severely limited the rights of individuals to obtain judicial review of legislative actions impinging on their constitutional rights. In addition, the Supreme Court has taken a disturbingly narrow view of the kinds of legislative activities to be covered by the privilege.

In *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court permitted the Executive branch to initiate criminal proceedings against a Congressman for allegedly accepting bribes to influence his vote on legislation affecting

postal rates so long as evidence of his legislative activities are not utilized. Of course, permitting the Executive to initiate such prosecutions revives precisely the evil which the Speech or Debate Clause sought to dismantle. A hostile Executive may now harass a critical or disfavored legislator by initiating criminal charges against him which in fact arise out of the performance of his duties.

In *Gravel v. United States*, 408 U.S. 606 (1972), the Executive attempted to subpoena a Congressional aide to testify before a grand jury investigating allegedly criminal activities involved in the publication of the Pentagon Papers by Senator Gravel.

Mr. Justice White, writing for six members of the Court, rejected the Government's contention that Congressional aides were wholly unprotected by the Speech or Debate clause. He noted that aides had been denied immunity in *Kilbourn*, *Dombrowski* and *Powell*, not because they were aides, but because the acts complained of in those cases would not have qualified for the privilege even if they had been performed by members of Congress.

In explaining the result in *Kilbourn*, Mr. Justice White distinguished between Congressional enactment of the arrest resolution (which was protected by the privilege) and its execution by the Sergeant-at-Arms (which fell outside the scope of the privilege).

In explaining the result in *Dombrowski*, involving an alleged conspiracy to violate the Fourth Amendment, Mr. Justice White stated:

"* * * [u]nlawful conduct of this kind the Speech or Debate Clause simply did not immunize," (33 L.Ed 2d at 599).

Finally, Mr. Justice White explained the Court's decision in *Powell* by characterizing the case as re-asserting:

"* * * judicial power to determine the validity of legislative actions impinging on individual rights * * * and to afford relief against House aides seeking to implement the invalid resolutions," (33 L.Ed 2d at 599).

Mr. Justice White concluded his *Gravel* analysis by stating:

"In *Kilbourn*-type situations both aide and member should be immune with respect to committee and House action. So too in *Eastland* as in [*Gravel*] senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." (33 L.Ed 2d at 600).

Applying his analysis to the facts of the *Gravel* case, Mr. Justice White ruled that the actions of Senator Gravel's aide in obtaining the Pentagon Papers and in arranging to have them published by Beacon Press were not immune from scrutiny.

While Mr. Justice White was correct in ruling that individuals could seek judicial review of the acts in question if they were alleged to have violated their constitutional rights, he was incorrect in permitting the Executive to instigate criminal investigations into such acts. While *Kilbourn*, *Dombrowski* and *Powell* support a narrow view of Congressional immunity in the context of civil proceedings commenced by private persons in order to safeguard their constitutional rights, they cannot be utilized as precedent for permitting the Executive to instigate criminal prosecution against legislators. Indeed in the only criminal case prior to *Gravel* and *Brewster*, the Supreme Court categorically denied such power to the Executive. *United States v. Johnson*, 383 U.S. 169 (1966).

By uncritically accepting the assumption that identical standards of immunity exist in both civil and criminal proceedings, the majority in *Gravel* ignored the history and purpose of the Speech or Debate Clause and permitted the potential resurgence of precisely the *in terrorem* technique which it was designed to destroy.

The Court again failed to distinguish between the standards of immunity in civil and criminal proceedings in its recent decision in *Doe v. McMillan*, 41 U.S.L.W. 4752 (May 29, 1973), this time in a civil action.

In *Doe*, a subcommittee of the House Committee on the District of Columbia issued a report on hearings on the public school system of the District of Columbia which included absentee records, tests, and disciplinary reports on certain named students. Parents of some of the named students brought an action against the Chairman and members of the House Committee on the District of Columbia, some committee staff, the Superintendent of Documents, the Public

Printer, and various officials of the public schools of the District of Columbia, asking injunctive relief and damages.

The Court held that the complaint against the Members of Congress and congressional staff for introducing materials with names at hearings, for referring this material to the Speaker of the House and for voting for publication was barred by the Speech and Debate Clause because those acts were "legislative acts" (citing *Gravel*) and as such, enjoy absolute immunity from suit.

However, the Court held that this absolute immunity did not extend to public distribution of the report, rejecting the claim of the respondents that such public distribution was a necessary part of the legislative function of informing the public. The Court, however, proceeded to limit even this protection for the injured individuals, because they ruled that the material could be distributed internally and be available for inspection by the public and press unless made unavailable by a specific Congressional order.

Because the record did not indicate the extent of publication and distribution that had taken place, the case has been remanded for further action.

The Court in *Doe* again failed to draw any distinction between the scope of the immunity which would exist in civil and in criminal proceedings. This decision thus represents an extension of the holding in *Gravel* that private republication of material presented at a Congressional hearing is not protected by the Speech and Debate clause. This case extends that holding so that some Congressionally-ordered publication by the Superintendent of Documents and the Public Printer is not protected, even though the Congressional act of authorization itself is protected.

Thus, in *Gravel* and *Doe*, the Court has altered the concept of Congressional immunity in two unfortunate ways: 1) it has expanded the liability of Members of Congress to criminal prosecution for publishing information and 2) it has severely limited the rights of individuals to recover for Congressional violations of their constitutional rights in the absence of private publication or outside functionaries who can be sued.

As a result of these decisions, it falls to Congress to enforce the historic thrust of the Speech and Debate Clause by appropriate legislation. Two steps are called for. Firstly, Congress must reassert that publication of information is part of the legislative process. Secondly, Congress must make it clear that individuals must have a right of action for violation of their constitutional rights even though criminal prosecutions are to be barred. There are two possible ways that Congress could achieve the latter. Congress could create different standards of immunity for applying the Speech and Debate Clause in civil and in criminal contexts. Or Congress could make it clear that the Speech and Debate Clause applies to criminal prosecutions but does not bar civil suits by individuals to protect against invasions of their constitutional rights. Such a statute would protect members of the Congress from a hostile Executive, while protecting the public against potential Congressional excesses.

The enactment of such legislation should, of course, be coupled with careful consideration of the rules and procedures by which the Congress itself could initiate and conduct the prosecution of a member alleged to have committed an offense in connection with the performance of his Congressional duties. Perhaps the problem could be dealt with by legislation providing that the initiation and conduct of the prosecution be carried on by Congressional officials, while its ultimate determination remains with the judiciary. Since Congress itself would initiate and conduct the prosecution, the danger of Executive overreaching would be eliminated. Since the judiciary would determine the matter, the dangers of partisanship would be minimized and the rights of the accused afforded due protection.

The existence of a strong and independent Congress is essential to the continued enjoyment of our heritage of freedom. I am, therefore, pleased to have had this opportunity to discuss the steps which Congress may take to protect itself against yet another encroachment upon its constitutional prerogatives.

Chairman METCALF. Thank you all very much for coming.

We will keep the hearing record open until Wednesday, August 1.

The committee now stands adjourned.

[Whereupon, the committee was adjourned at 12:30 p.m.]

[The Fordham Law Review article on congressional self-discipline, referred to by Chairman Metcalf during the course of the discussion at page 100, follows:]

CONGRESSIONAL SELF-DISCIPLINE: THE POWER TO EXPEL, TO EXCLUDE AND TO PUNISH

GERALD T. McLAUGHLIN*

RECENT events have again focused attention on Congress' power to discipline its members for personal misconduct. On April 19, 1972, the House Committee on Standards of Official Conduct¹ recommended that Texas Representative John Dowdy be stripped of his right to vote on the floor of the House or in committee as a result of his conviction for bribery and perjury.² On that same day, two Senators argued before the Supreme Court that the Constitution forbids the executive branch from investigating the official conduct of a member of Congress, and delegates all responsibility for punishing members' wrongdoing to each house of Congress.³ Finally, on June 29, 1972, a Supreme Court majority in *United States v. Brewster*,⁴ while holding that a former Senator was not immune to criminal prosecution for accepting a bribe while in office, commented that Congress did not have specifically articulated standards for the discipline of its members,⁵ and that in a disciplinary proceeding a member of Congress "is at the mercy of an almost unbridled discretion of the charging body"⁶

The Constitution provides Congress with three specific powers to discipline its own members: the power to expel, the power to exclude and the power to punish.⁷ Congress needs these powers primarily for two reasons. First, both the Senate and the House of Representatives must maintain their own institutional integrity and the "proper functioning of the legislative process."⁸ Second, each house possesses certain privileges which guarantee Congress' existence as a separate but equal branch of government. Not the least of these is the privilege which protects a Senator or

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1. See note 22 *infra*.

2. Wall St. J., April 20, 1972, at 1, col. 3.

When a member of Congress has been indicted for a felony, the House of Representatives and the Senate usually do not take action until after the conclusion of judicial proceedings. R. Getz, *Congressional Ethics* 90 (1966) [hereinafter cited as Getz].

3. N.Y. Times, April 20, 1972, at 8, col. 1.

4. 408 U.S. 501 (1972).

5. *Id.* at 519. See *In re Chapman*, 166 U.S. 661, 669-70 (1897).

6. 408 U.S. at 519.

7. U.S. Const. art. I, § 5. The power to exclude is inferred from the power of each house to judge the qualifications of its members.

8. Special Committee on Congressional Ethics, *Association of the Bar of the City of New York, Congress and the Public Trust* 202 (1970) [hereinafter cited as *Congress and the Public Trust*].

Representative from being questioned elsewhere about his acts or speeches in Congress.⁹ If a member of Congress is to enjoy such a broad privilege, Congress requires its own in-house disciplinary sanctions to guard against the abuse of that privilege.¹⁰ In effect then, Congress' power of self-discipline is necessitated both by its internal workings and by its relationship with the other branches of the federal government.

At the same time, however, the power of Congress to expel, to exclude or to punish a member is itself limited by the people's right to elect whomever they wish to represent them.¹¹ Congress' power to discipline its members and the people's right to choose their representatives have collided in the past¹² and will undoubtedly do so again in the future. This article explores one half of that critical tension: Congress' powers of self-discipline. To that end, the article treats each of Congress' disciplinary powers separately to demonstrate that there are definite procedural and substantive rules which limit the exercise of these powers—rules which do approximate those "specifically articulated standards" whose existence the Supreme Court majority in *Brewster* denied.¹³

9. U.S. Const. art. I, § 6. The privilege protects members of Congress from inquiry into legislative acts or the motivation behind legislative acts. The privilege does not cover all conduct relating to the legislative process. *United States v. Brewster*, 408 U.S. 501, 516 (1972). For other recent discussions of the congressional privilege, see *Gravel v. United States*, 408 U.S. 606 (1972); Gravel, *Congressional Privilege: The Case of Sen. Gravel*, 167 N.Y.L.J., March 31, 1972, at 1, col. 1.

10. "If Congress did not police itself, its Members would be above all law in the areas protected by Congressional immunity, a concept alien to our legal system and never intended by the framers of the Constitution." Congress and the Public Trust, *supra* note 8, at 203.

A discussion of when Congress has exclusive jurisdiction to punish a member is beyond the scope of this article. Suffice it to say that in the areas protected by Congressional immunity, Congress alone may punish a member. See *United States v. Brewster*, 408 U.S. 501, 518 (1972). Outside of this area, however, Congress as well as appropriate federal, state or local authorities may discipline a member. Usually Congress will not seek to punish a member until after the conclusion of any judicial proceedings brought against him. Cf. note 2 *supra*.

The Supreme Court majority in *United States v. Brewster* remarked that Congress is ill-equipped to investigate, try and punish its members for conduct that is loosely and incidentally related to the legislative process. 408 U.S. at 518.

11. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them. . . .' As Madison pointed out at the [Constitutional] Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (citation omitted).

12. Adam Clayton Powell was excluded from the 90th Congress but was overwhelmingly re-elected by his constituents. It was not until the 91st Congress two years later, and only after a long court battle, that Powell was finally seated.

13. See notes 5 & 6 *supra* and accompanying text.

I. EXPULSION

Article I, section 5, clause 2 of the Constitution provides: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two thirds, expel a member."

Once a Senator or Representative has been administered the oath of office and takes his seat, he cannot be required to surrender that seat without a two-thirds vote of the particular house (expulsion).¹⁴ On the other hand, if a member has not been seated, a simple majority of the house can prevent him from taking his seat (exclusion).¹⁵ The seating of a member thus becomes critical because thereafter the member cannot be removed except by expulsion, requiring the concurrence of two-thirds of his colleagues. It is true that certain rights of a seated member may be temporarily suspended by a majority vote as a punishment, but suspension does not deprive a member of his seat.¹⁶ If a house votes to expel or exclude a member, however, the seat thereby becomes vacant and a special election must be held.¹⁷

Except for the requirement of a two-thirds majority, the Constitution does not explicitly restrict Congress' power to expel. This does not mean, however, that the power of expulsion is untrammelled. Certain limitations, both procedural and substantive, restrict Congress' exercise of this sanction.

A. Procedural Restraints

1. Participation in Expulsion Proceedings

In *Powell v. McCormack*,¹⁸ the Supreme Court remarked that a member may as a matter of right address his colleagues and participate fully in the debate on his expulsion, while a member-elect whose exclusion is under consideration apparently does not have the same right.¹⁹ Although a mem-

14. *Powell v. McCormack*, 395 U.S. 486, 507 n.27 (1969). There may be one exception to this rule, however. See text accompanying notes 60-61 *infra*.

15. 395 U.S. 486, 507 n.27.

16. For a discussion of suspension, see Hobbs, Comments on *Powell v. McCormack*, 17 U.C.L.A.L. Rev. 129, 151-52 (1969) [hereinafter cited as Hobbs].

17. U.S. Const. art. I, § 2, cl. 4 provides: "When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies." U.S. Const. amend. XVII, cl. 2 provides that in the case of the Senate the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

18. 395 U.S. 486 (1969).

19. *Id.* at 510 n.30 (1969). This comment may have greater significance than at first appears. As one commentator remarked: "This also might be interpreted as an indication of

ber-elect may be permitted to speak in his own behalf,²⁰ a seated Senator or Representative, as an already functioning member of Congress, would seem to have the stronger claim to participate in the debate over his expulsion.

Although not specifically required by rule or court decision, reasonable procedural rights should be extended to a member whose expulsion is being considered: the right to attend with counsel any relevant committee hearings, the right to have witnesses subpoenaed in his defense, the right to have a written statement of the accusations made against him, the right to a transcript of all hearings where testimony is taken and the right to cross-examine his accusers.²¹ Since the appropriate committee of the House or Senate will usually investigate the allegations made against the member and recommend a course of action to the full body, it is imperative that these procedural rights be afforded in the committee hearings.²² To permit the exercise of certain of these rights during a full Senate or House debate on a member's expulsion may be unwieldy.²³ In any event

a willingness on the part of the Court to pass constitutional judgment on the appropriateness of House procedures. There is, however, a more important implication, namely, that the Court possesses the competence to determine exactly what those procedures are." Hobbs, *supra* note 16, at 144.

For a discussion of the problems of jurisdiction and justiciability raised by these remarks, see Weckstein, Comments on *Powell v. McCormack*, 17 U.C.L.A.L. Rev. 73, 77-89 (1969).

20. 1 A. Hinds, *Precedents of the House of Representatives of the United States* § 474 (1907) [hereinafter cited as *Hinds*].

21. In the expulsion proceedings brought against him, Senator John Smith of Ohio requested that he be informed specifically of the charges against him, that he be allowed to make a defense against such charges, and have process to compel the attendance of witnesses and the privilege of being heard by counsel. The Senate permitted him to be heard by counsel; the other requests were not granted, however. 2 *Hinds*, *supra* note 20, § 1264.

In *United States v. Brewster*, the Supreme Court expressed the view that the process of disciplining a member in Congress is not without some risk of abuse since "it is not surrounded with the panoply of protective shields that are present in a criminal case." 408 U.S. at 519.

22. In 1964, the Senate established the Select Committee on Standards and Conduct to investigate allegations of improper conduct on the part of Senators. Before recommending any disciplinary action to the full Senate, the Committee must give the individuals concerned due notice and an opportunity for a hearing. S. Res. 338, 88th Cong., 2d Sess. § 2(a)(2) 110 Cong. Rec. 16,939 (1964). Beyond this, there is no requirement that the Committee grant a member being investigated any procedural rights.

In 1968 the House of Representatives established a Committee on Standards of Official Conduct to investigate alleged wrongdoings of its members. Again, the only procedural requirement is for notice and a hearing. H.R. Doc. No. 402, 90th Cong., 2d Sess. § 720, Rule XI (19)(c)(2) (1968).

23. Counsel for Senator John Smith argued before the entire Senate during the debates

Congress should remember that when it expels a member, it effectively acts as a court²⁴ and should be limited by reasonable due process requirements.²⁵

2. Two-Thirds Majority

The most important limitation on Congress' use of the expulsion power is the requirement that two-thirds of the membership of the particular house concur.²⁶ Although Gouverneur Morris felt that a simple majority should have the power to expel,²⁷ James Madison urged the view that "expulsion was too important to be exercised by a bare majority of a quorum; and in emergencies . . . [one] faction might be dangerously abused."²⁸ This is one of several areas in the Constitution where a two-thirds majority is required. By a two-thirds vote of both houses, Congress may remove an incapacitated President,²⁹ override a Presidential veto³⁰ or propose a Constitutional amendment.³¹ Similarly, a two-thirds vote of the Senate is necessary to impeach a member of the executive or the federal judiciary.³² All of these areas are of particular importance since they are integral to the scheme of checks and balances under which the three branches of government operate. Expulsion is no less important, not because it involves intra-governmental checks and balances, but because it involves the people's basic right to be represented in Congress by the member of their choice.

over his expulsion (1807). See 2 Hinds, *supra* note 20, § 1264. A member has been permitted to cross-examine other members during the expulsion debate. *Id.* § 1643.

24. *United States v. Brewster*, 408 U.S. 501, 518 (1972).

25. Differing views have been expressed as to whether Congress could expel a member based on evidence that would be inadmissible in court. See the committee report in the expulsion case of John Smith of Ohio (1807) cited in 2 Hinds, *supra* note 20, § 1264, for the position that ordinarily inadmissible evidence may be considered. For a different position see the remarks of Senator Bayard of Delaware, *Id.* § 1269.

26. U.S. Const. art. I, § 5, cl. 2.

By analogy to certain Supreme Court decisions, it could be argued that the majority required to expel a member is two-thirds of those present in each house (assuming the presence of a quorum) and not of the entire membership. See *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (a vote of two-thirds of those members present in each house is sufficient for the adoption of a constitutional amendment); *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1919) (a Presidential veto might be overridden by a vote of two-thirds of the members present).

27. *Records of the Federal Convention of 1784*, at 254 (M. Farrand ed. 1937).

28. C. Warren, *The Making of the Constitution* 424 (1928). See *United States v. Brewster*, 408 U.S. 501 (1972) ("[I]t would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment"). *Id.* at 519-20.

29. U.S. Const. amend. XXV, § 4.

30. *Id.* art. I, § 7, cl. 2.

31. *Id.* art. V.

32. *Id.* art. I, § 3, cl. 6.

B. *Substantive Restraints*

In addition to these procedural limitations, are there substantive restraints which limit the expulsion power, or may Congress expel a member for any reason whatever? There are convincing arguments that Congress' power to expel is not unlimited.

1. *Prior Misconduct*

Both houses of Congress seem to distrust their power to expel a member for misconduct committed either during prior Congresses or before entering Congress.³³ This distrust has been justified in several ways. To those who view expulsion as a power given "to enable each house to exercise its constitutional function of legislation unobstructed,"³⁴ the remedy is not warranted as long as the member's conduct does not obstruct *this* Congress in its legislative work. To those who claim that the people are the final judge of the conduct of those who represent them, "prior misconduct is pardoned . . . by the electorate."³⁵ For whatever reasons, Congress will probably not expel a member for prior misconduct, except perhaps in extreme cases.³⁶

2. *Grounds for Expulsion*

The Senate by a two-thirds vote may impeach a member of the executive or a federal judge. The Constitution provides for impeachment for officials of the executive and federal judiciary, but curiously, not for members of Congress. Expulsion, which also requires a two-thirds vote, was doubtlessly intended to be the equivalent punishment for members of Congress.³⁷ This

33. *Powell v. McCormack*, 395 U.S. 486, 508-09 (1969). For cases in the House of Representatives and Senate concerning prior misconduct, see 2 Hinds, *supra* note 20, §§ 1283-89.

It is not clear to what extent Congress could discipline a former member for misconduct occurring while he was a member. See *United States v. Brewster*, 408 U.S. 501 (1972). Undoubtedly much would depend on whether the acts of the former member were within the scope of congressional immunity. See note 9 *supra*.

34. H.R. Rep. No. 815, 44th Cong., 1st Sess. 2 (1876), cited in *Powell v. McCormack*, 395 U.S. 486, 509 n.29 (1969).

35. Hobbs, *supra* note 16, at 146.

36. Although it ultimately cleared him of all charges, a Senate committee did investigate alleged prior misconduct by Senator Charles H. Dietrich of Nebraska (1904). It should be noted, however, that Dietrich himself had requested the investigation. Senate Election, Expulsion and Censure Cases from 1789-1960, Sen. Doc. No. 71, 87th Cong., 2d Sess. 98 (1962) [hereinafter cited as Senate Cases].

For a view that the power to expel for prior misconduct is desirable, see Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harv. L. Rev. 673, 684 (1968).

37. See *Congress and the Public Trust*, *supra* note 8, at 204. An impeachment proceed-

close identity between impeachment and expulsion should not be forgotten when analyzing substantive restraints on Congress' power to expel.

While the Constitution is silent as to the offenses which would cause a member to be expelled, it does mention offenses for which impeachment is appropriate. Article II, section 4 provides that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." There can be little argument that treason and bribery are proper grounds for impeachment since they are both indictable offenses and involve a breach of the public trust. The meaning of the phrase "other high crimes and misdemeanors," however, is less clear. The use of the word "other" seems to imply that any additional grounds for impeachment should be of the same serious nature as treason and bribery and involve official misconduct. From the constitutional debates, it is evident that the impeachment provisions were aimed at preventing "the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office."³⁸ Thus, to be impeachable, the conduct in question must either be an indictable offense which involves serious consequences to the United States or, if not an indictable offense, one which involves malicious or corrupt acts in the discharge of official duties, causing great detriment to the United States.³⁹

ing has been brought against only one member of Congress. On July 7, 1797 the House decided to bring impeachment proceedings against William Blount of Tennessee. The charges included a conspiracy to transfer to England property belonging to Spain in Florida and Louisiana, thereby violating America's neutrality, and attempts to foment trouble between certain Indian tribes and the United States. Blount was first expelled from the Senate; then he attacked the jurisdiction of the Senate to try him for impeachment. His claim that he could not be considered a "civil officer" of the United States subject to impeachment was ultimately upheld by the Senate when it dismissed the impeachment proceedings. This result has been considered a precedent for the proposition that members of Congress are not impeachable. See Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *Fordham L. Rev.* 1, 25-26 (1970) [hereinafter cited as Feerick]; *Senate Cases*, *supra* note 36, at 3.

On January 28, 1873, the Vice President asked the Senate to form a committee to investigate charges made against his character. The request was opposed because the Vice President was not a member of the Senate who might be expelled, but an officer of Government, who should be proceeded against by impeachment. The Vice President's request to appoint the committee was denied. 2 *Hinds*, *supra* note 20, § 1242. In this instance the power to expel was considered the equivalent of impeachment.

See also *id.* § 1286, citing a House investigation report: "The office of the power of expulsion is so much the same as that of the power to impeach that we think it may be safely assumed that whatever would be a good cause of impeachment would also be a good cause of expulsion."

38. Feerick, *supra* note 37, at 53.

39. *Id.* at 54-55 & n.286. Even though Congress may expel a member who commits an

It has been argued, however, that "an impeachable offense is whatever the majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."⁴⁰ Such arguments clearly go too far. The Constitution does set limits on what acts may be considered impeachable. An official's private and lawful conduct, outside the scope of his office, cannot be the basis of impeachment since it is not indictable and it does not involve a betrayal of the public trust. Thus, for example, if a federal official has permitted excerpts from his book to be printed near nude photographs and a caricature of the President, he has not committed an impeachable offense.⁴¹

If an official of the executive or a federal judge may be impeached only for misconduct in office, Senators and Representatives should be expelled only for similar conduct. As with impeachment, intimations that each house of Congress has unlimited power to expel a member for any conduct whatsoever are wrong.⁴² Congress should exercise its expulsion power only when a serious indictable offense has been perpetrated or when the particular member of Congress has betrayed the public trust by misconduct in office.

Even without reference to the impeachment provision, however, other constitutional limitations would restrict Congress' exercise of its expulsion power.⁴³ The right to freedom of speech clearly restricts Congress' power to expel a member for remarks made either in or outside Congress.⁴⁴ In

indictable offense involving serious consequences to the United States, there must still be the two-thirds vote to expel. Otherwise Congress, by a simple majority vote, could pass a criminal statute, conviction under which would result in immediate forfeiture of a member's seat. For a discussion of such problems, see Getz, *supra* note 2, at 91-92.

40. 116 Cong. Rec. 11913 (1970) (Remarks of Congressman Ford).

41. These were some of the numerous charges levelled against Justice William O. Douglas. See *id.* at 11916 (Remarks of Congressman Ford).

42. See *In re Chapman*, 166 U.S. 661, 669-70 (1897); Congress and the Public Trust, *supra* note 8, at 203-204; 2 Hinds, *supra* note 20, § 1279 (committee report cited therein at 843). Congress has more latitude in punishing a member than in expelling him. See notes 117-20 *infra* and accompanying text.

43. See Weckstein, Comments on *Powell v. McCormack*, 17 U.C.L.A.L. Rev. 73, 90 (1969); Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674-75 (1968).

In discussing the Senate's power to judge the qualifications of its members, the Supreme Court observed that the exercise of this power was "subject only to the restraints imposed by or found in the implications of the Constitution." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929).

44. Of course, there are limitations even on a legislator's freedom of speech. If his remarks are treasonable, Congress could rightly expel the member. The "speech and debate" clause immunizes a member from being questioned "in any other place" but not in the House or

Bond v. Floyd,⁴⁵ the Supreme Court observed: "The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."⁴⁶ Similarly, a member could not be constitutionally expelled for his religious beliefs unless these beliefs were somehow detrimental to the country.⁴⁷ Both the due process clause and the equal protection clause would also be relevant in this context. The due process clause would prohibit a house of Congress from expelling a member on grounds that bear "no rational relation to legitimate concerns of the legislature."⁴⁸ The equal protection clause would prevent Congress from arbitrarily expelling certain members on grounds of wealth, age, race or profession. Finally, Congress would be prohibited from employing bills of attainder or ex post facto laws in order to expel a member.⁴⁹

C. Expulsion Cases in the Senate and House of Representatives

From an analysis of the Senate and House cases, several conclusions can be drawn. First, expulsion is rarely used by either house. No member of either the House or the Senate has been expelled since 1862 and there have been few attempted expulsions in recent decades. Second, whenever the House or the Senate has expelled a member, it has been for treason or dis-

Senate itself. In 1917 the Minnesota Commission of Public Safety presented a resolution to the Senate "looking to the expulsion of Senator Robert M. La Follette 'as a teacher of disloyalty and sedition, giving aid and comfort to our enemies, and hindering the Government in the conduct of the war,' such petition being based upon a speech of alleged disloyal nature" The committee investigating this and other charges against Senator La Follette decided that the speech did not merit action by the Senate. Senate Cases, *supra* note 36, at 110.

Similarly, expulsion resolutions were introduced against two members of the House of Representatives for words alleged to be treasonable (1864). 2 Hinds, *supra* note 20, §§ 1253-54.

45. 385 U.S. 116 (1966).

46. *Id.* at 136.

47. In the unsuccessful attempt to expel him (1907), Senator Reed Smoot of Utah was accused of "membership in a religious hierarchy that countenanced and encouraged polygamy and a united church and state contrary to the spirit of the Constitution. . . ." Senate Cases, *supra* note 36, at 98. Clearly Congress did not consider these beliefs to be so harmful to the United States as to merit expulsion. See also U.S. Const. art. VI, cl. 3, which prohibits any religious test from being required as a qualification to any public office under the United States.

48. Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674 (1968). In another context, the Supreme Court has remarked: "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights" *United States v. Ballin*, 144 U.S. 1, 5 (1892).

49. U.S. Const. art. I, § 9, cl. 3.

loyalty. Even when Congressional committees have proposed a member's expulsion, the offenses alleged have usually involved serious official misconduct. Thus, it seems that in practice the Senate and House have equated the grounds of expulsion with the grounds of impeachment.

1. Senate

In all, twenty-three Senators have been expelled.⁵⁰ Twenty-two of the twenty-three cases occurred during the Civil War; the only other instance, that of William Blount of Tennessee, occurred in 1797. It is interesting to note that the basis of expulsion in each case was treason or disloyalty. Blount, for example, was expelled for plotting with the British to seize Spanish Florida and Louisiana and for instigating trouble with the Indians.⁵¹ On February 15, 1862, Jesse D. Bright of Indiana was expelled because he had written a letter to Jefferson Davis introducing a friend who wished "to dispose of what he regards a great improvement in firearms."⁵²

Ten other Senators, although not expelled, have been the subject of Senatorial expulsion proceedings.⁵³ In four of these cases the basis for the attempted expulsion was suspected treason or disloyalty.⁵⁴ Accepting bribes or receiving compensation for services rendered before a department of the Government was the charge in five other cases.⁵⁵ In the final case, Senator Reed Smoot of Utah was charged with membership in a "religious hier-

50. They are: William Blount of Tennessee (1797), Senate Cases, *supra* note 36, at 3; Jefferson Davis, Albert G. Brown, Stephen R. Mallory, David L. Yulee, Clement C. Clay, Benjamin Fitzpatrick, Robert Toombs and Judah P. Benjamin (1861), *id.* at 27; James M. Mason, Robert M. T. Hunter, Thomas L. Clingman, Thomas Bragg, James Chestnut, Jr., A. O. P. Nicholson, William K. Sebastian, Charles C. Mitchel, John Hemphill and Louis T. Wigfall (1861), *id.* at 28; John C. Breckenridge (1861), *id.* at 29; Jesse D. Bright (1862), *id.* at 30; Waldo P. Johnson (1862), *id.*; Trusten Polk (1862), *id.* at 31. There is some question whether Senators Davis, Brown, Mallory, Yulee, Clay, Fitzpatrick, Toombs and Benjamin were technically expelled. See *id.* at 27.

In 1877 the Senate annulled the expulsion of William K. Sebastian. 2 Hinds, *supra* note 20, § 1243.

51. See note 37 *supra*.

52. Senate Cases, *supra* note 36, at 30 n.8.

53. An eleventh Senator, John H. Mitchell of Oregon, was accused of conspiracy to defraud the United States and accepting bribes (1905) but died before the Senate could act. 2 Hinds, *supra* note 20, § 1278; Getz, *supra* note 2, at 88.

54. John Smith (1807), Senate Cases, *supra* note 36, at 4; Lazarus W. Powell (1862), *id.* at 31; Benjamin Stark (1862), *id.* at 34; Robert M. La Follette (1917), *id.* at 110.

The resolution to expel Senator Smith was narrowly defeated and he subsequently resigned. The resolutions to expel Senators Powell and Stark were defeated. Senator La Follette was cleared of all charges and no expulsion vote was taken by the Senate.

55. James F. Simmons (1862), Senate Cases, *supra* note 36, at 32; James W. Patterson (1873), *id.* at 52-54; Charles H. Dietrich (1904), *id.* at 98; Joseph R. Burton (1906), *id.* at 99; Burton K. Wheeler (1924), *id.* at 113. In the case of Simmons, the Senate committee which investigated the charges recommended expulsion but Simmons had resigned his seat before the next session of the Senate began. As for Patterson, he was defeated for reelection

archy that countenanced and encouraged polygamy and united church and state contrary to the spirit of the constitution"⁵⁶

2. House of Representatives

In contrast to the Senate, the House of Representatives has used the power of expulsion rarely. Only three members have been expelled—all on the ground of treason.⁵⁷ Various House investigating committees have often recommended expulsion of a member only to have the full House vote censure instead.⁵⁸ In these situations, however, the offenses alleged did involve official, rather than private misconduct—namely, bribery or the sale of appointments to military academies.⁵⁹

A word must be said about a number of cases in which a house of Congress has, in effect, "expelled" a seated member by a majority vote, rather than by a two-thirds vote. When a question arises about a member's valid election or eligibility for office, even after his seating, Congress has traditionally treated such a question as one of exclusion rather than one of expulsion. Thus, by a vote of 14 to 12, and after he had sat in Congress for one year, Albert Gallatin's election to the Senate was declared void because he had not been a citizen for nine years as required by the Constitution.⁶⁰ Similarly, the House of Representatives found that William Vandever was not entitled to his seat because he had accepted an office incompatible with his position in the House.⁶¹ Although analogous in certain respects to cases of expulsion, these cases are properly treated as exclusions because they involve questions of eligibility for office, which is the focus of Congress' power to exclude.

II. EXCLUSION

Article I, section 5, clause 1 of the Constitution provides: "Each House shall be the judge of the elections, returns and qualifications of its own

before the Senate could consider the committee report recommending expulsion. Senator Burton resigned before the Senate committee filed a report. Both Senators Dietrich and Wheeler were cleared of the charges brought against them.

56. Senate Cases, *supra* note 36, at 97-98.

57. They were: John W. Reid and John B. Clark, both of Missouri, and Henry C. Burnett of Kentucky (1861). 2 Hinds, *supra* note 20, §§ 1261-62. John B. Clark had never taken his seat, however, and was technically excluded by a two-thirds vote rather than expelled.

58. Getz, *supra* note 2, at 85-87.

59. *Id.*

60. Senate Cases, *supra* note 36, at 1. For other instances of "exclusions" of seated Senators, see the cases of James Shields, *id.* at 14, James Harlan, *id.* at 21, and John P. Stockton, *id.* at 38.

61. (1863). 1 Hinds, *supra* note 20, § 504. It should be noted that the Speaker of the House overruled a point of order objecting to the exclusion resolution on the ground that expulsion was the proper penalty in the case of a seated member. For other cases of House "exclusions" of seated members, see *id.* §§ 486-87.

Members." Since it may judge the qualifications of its members and the regularity of their elections, Congress may obviously exclude someone not properly elected or not having the requisite qualifications of membership.

Exclusion differs from expulsion in two important procedural respects. First, a prospective member must be excluded, while a member who has taken his seat must be expelled.⁶² Second, a prospective member may be excluded by a simple majority, while a seated member must be expelled by a two-thirds vote. Exclusion and expulsion, then, "are not fungible proceedings."⁶³ As with expulsion, however, there are definite limitations, both procedural and substantive, on Congress' power to exclude.

A. *Procedural Restraints*

Although a member under threat of expulsion may have a more established right to participate in proceedings brought against him, a prospective member should be given the same procedural rights in an exclusion proceeding.⁶⁴ The people's right to be represented by whomever they choose should not be treated cavalierly. Before excluding a prospective member, Congress should afford him not only the right to participate fully in the debate but also whatever procedural rights are needed to prepare a proper defense.

B. *Substantive Restraints*

Exclusion is not included in the list of disciplinary powers in Article I, section 5, clause 2 of the Constitution, but rather is implied in the election provision of clause 1. It is incidental "not to Congressional discipline but to the final authority of Congress over the process of its Members' elections."⁶⁵ The framers of the Constitution provided for exclusion by a simple

62. See text accompanying notes 60-61 *supra*.

63. *Powell v. McCormack*, 395 U.S. 486, 512 (1969).

64. See notes 18-21 *supra* and accompanying text. Brigham H. Roberts, who was excluded from the 56th Congress for polygamy, was permitted to speak in his own defense (1899). 1 Hinds, *supra* note 20, § 474. During the committee hearings on his exclusion, Adam Clayton Powell requested that he be given "(1) notice of the charges pending against him, including a bill of particulars as to any accuser; (2) the opportunity to confront any accuser, to attend all committee sessions where evidence was given, and the right to cross-examine all witnesses; (3) public hearings; (4) the right to have the Select Committee issue its process to summon witnesses for his defense; (5) and a transcript of every hearing." The Committee stated that it had given Powell notice of the matters it would investigate, that he and his counsel could attend all hearings and that the committee would call witnesses on Powell's written request and supply a transcript. Hearings on H.R. Res. 1 Before the Select Committee Pursuant to H.R. Res. 1, 90th Cong., 1st Sess. 54-59 (1967). See also Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harv. L. Rev. 673, 675 n.13 (1968).

65. *Congress and the Public Trust*, *supra* note 8, at 204.

majority vote,⁶⁶ an indication that they considered exclusion a relatively limited power, with limited potential for abuse and political factionalism.⁶⁷ The grounds for exclusion specified in the Constitution relate to a member's eligibility for office, and to the validity of his election, rather than to his personal conduct. Congress, however, has not always respected the constitutional limits on its power to exclude.

1. Grounds for Exclusion

Article I of the Constitution mentions three standing qualifications for membership in Congress: age, citizenship and residency. Section 3 of that article provides that "[n]o person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." As for the House of Representatives, Article I, section 2 provides: "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." A fourth constitutional requirement, as noted by the Supreme Court in *Roudebush v. Hartke*⁶⁸ is that the member be elected.⁶⁹

In addition to the *qualifications* for Congressional membership listed in the Constitution, it has been argued that the Constitution also lists certain *disqualifications* for membership.⁷⁰ Thus, a person is disqualified from membership in Congress if he has been impeached,⁷¹ if he holds any other office under the United States,⁷² if he was elected by a state not having a republican form of government,⁷³ if he refuses to take an oath or affirmation to support the Constitution,⁷⁴ or if after taking such an oath to support

66. Prior to 1787, English and colonial antecedents support the conclusion that both expulsion and exclusion could be effected by a majority vote. See *Powell v. McCormack*, 395 U.S. 486, 536 (1969).

67. See the remarks of James Madison in the text accompanying note 28 *supra*.

68. 405 U.S. 15 (1972).

69. *Id.* at n.23. The Supreme Court cites the seventeenth amendment as the source of this requirement for membership in the Senate. The same qualification for House membership could be inferred from article I, section 2, clause 1 of the Constitution.

There seems to be some authority that mental capacity may be implied as a fifth qualification. See 1 Hinds, *supra* note 20, § 441, (Senate investigation of the sanity of a Senator-elect).

70. Dionisopoulos, A Commentary on the Constitutional Issues in the *Powell* and Related Cases, 17 J. Pub. L. 103, 111-15 (1968), [hereinafter cited as *Dionisopoulos*].

71. U.S. Const. art. I, § 3.

72. *Id.* art. I, § 6.

73. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

74. U.S. Const. art. VI.

the Constitution, he engages in insurrection or rebellion or gives aid and comfort to the enemy.⁷⁵ Although in *Powell*, the Supreme Court refused to rule whether any or all of these disqualifications were in fact negative requirements for membership,⁷⁶ there seems to be ample textual evidence to conclude that they were intended to be.⁷⁷ Congress has in the past relied on these "disqualifications" in excluding a member-elect. Thus, Representative Vandever was excluded because he accepted another office under the United States;⁷⁸ Victor Berger was held not qualified to take his seat in the House of Representatives because he allegedly gave aid and comfort to the enemy after having taken an oath to support the Constitution;⁷⁹ and William Fishback and Elisha Baxter of Arkansas were denied Senate seats because at the time no republican government could be reestablished in Arkansas due to the continuation of armed hostilities.⁸⁰ Although there seems to have been no case where an elected Senator or Representative had been previously impeached or refused to take the oath to support the Constitution, the credentials of Senator Smoot of Utah were challenged because he allegedly had already taken a religious oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."⁸¹

2. Exclusion Generally Does Not Involve Questions of Personal Misconduct

One difference between exclusion and expulsion is readily apparent: the grounds for exclusion should rarely cause a house of Congress to inquire into a prospective member's personal misconduct.⁸² Either house of Congress would be hard put to justify a character investigation under the guise of determining proper age, citizenship or residency. Whether an elected

75. Id. amend. XIV, § 3.

76. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969).

77. See Hobbs, *supra* note 16, at 147-48.

78. Vandever had become a colonel of the Ninth Regiment Iowa Volunteer Infantry. 1 Hinds, *supra* note 20, § 504. For a discussion of other instances where accepting other offices disqualified one from being a member of Congress, see Dionisopoulos, *supra* note 70, at 111-13.

79. (1919). Id. at 115.

80. (1864). Senate Cases, *supra* note 36, at 35.

81. (1903). Id. at 98.

82. Another difference might involve the evidence needed to prove each type of allegation. Generally, although by no means always, the relevant evidence needed in an exclusion proceeding will be documentary proof of age, citizenship and residency. In expulsion cases, the evidence required will usually be more elaborate, involving testimony of witnesses as in a courtroom. See 1 Hinds, *supra* note 20, §§ 424-25, for an instance where the House of Representatives permitted "parol evidence to prove the naturalization of a Member who could produce neither the record of the court nor his certificate of naturalization." Id. at § 424.

representative has been previously impeached, holds a second government job or refuses to take the oath of office are likewise questions requiring rather limited inquiry. Even Congress' little-used power to refuse admission to representatives of states not having a republican form of government could not reasonably support an investigation into personal misconduct of these representatives, but only into the governmental structure under which they were chosen. In all of these instances, exclusion is used to enforce the eligibility requirements listed in the Constitution but not to discipline a member-elect for personal misconduct.

There are two exceptions to this rule, however. In determining whether to exclude a member-elect who has not been properly elected or who has given aid and comfort to the enemy in contravention of his oath, Congress may have to judge personal misconduct. On several occasions, Congress, as supreme board of elections, has investigated suspected misconduct of a winning candidate.⁸³ In the cases of Frank L. Smith of Illinois and William S. Vare of Pennsylvania, the Senate went so far as to refuse them their seats because of the exorbitant amount of money spent in their campaigns.⁸⁴ Victor Berger was excluded because his pacifist activities allegedly gave aid and comfort to the enemy in contravention of his oath.⁸⁵ In these instances, the power to exclude was used as a disciplinary sanction. It should be noted, however, that these exceptions do have a narrow scope. For instance, in order to exclude a winning candidate for election improprieties, the exclusion must result from misconduct that directly affected the election, such as fraud or bribery.⁸⁶ It would be impermissible for Congress to inquire into a candidate's conduct not directly connected with the election.

3. Congress' Power to Require Qualifications for Membership in Addition to Those Listed in the Constitution

In *Powell v. McCormack* the Supreme Court clearly held that neither Congress nor any house thereof can establish qualifications in addition to those already contained in the Constitution.⁸⁷ The history of the debates at the Constitutional Convention gives some support to this interpretation. At the Convention, a committee report proposed that Congress should have

83. See, e.g., Senate Cases, *supra* note 36, at 142-44.

84. (1926). *Id.* at 119-23.

85. (1919). See Dionisopoulos, *supra* note 70, at 115.

86. See Senate Cases, *supra* note 36, at 124. The Senate exonerated Arthur R. Gould of all charges of fraud and stated that "the transaction had no relation to his election to the Senate."

87. 395 U.S. 486, 550 (1969).

Similarly the states may not impose additional qualifications on Congressional eligibility, see 1 Hinds, *supra* note 20, §§ 413-17.

the power "to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."⁸⁸ Gouverneur Morris moved to strike out the words "with regard to property," thus in effect permitting Congress to establish any qualifications it deemed expedient.⁸⁹ Madison objected, arguing that if Congress could establish qualifications, "it can by degrees subvert the Constitution . . . by limiting the number capable of being elected. . . . Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction."⁹⁰ When the issue came to a vote, Madison's position prevailed by a vote of seven states to four. Similarly, the Convention defeated the property qualification by a vote of seven states to three.⁹¹

In denying Congress the power to establish discretionary qualifications for members, the framers were following earlier state constitutional precedents. Although prior to 1787 state constitutions specified many qualifications for membership in the legislature (such as age, residence, religion, property, etc.) there is "no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution."⁹²

Subsequent history also strengthens this conclusion. At least four constitutional amendments have been proposed which would add to the qualifications specified in the Constitution.⁹³ Clearly if Congress already had the power to set its own qualifications, there would be little reason to attempt to amend the Constitution.

In summary, although in certain limited situations exclusion serves a disciplinary function, exclusion is more an incident of Congress' power as supreme board of elections than of its power as guardian of congressional ethics.

C. *Exclusion Cases in the Senate and the House of Representatives*

Both houses of Congress, but particularly the House, have tended to view exclusion as a wider disciplinary power than a close study of the Constitutional provisions would warrant.

88. Warren, *supra* note 28, at 418.

89. *Id.* at 420.

90. *Id.*

91. *Id.* at 421.

92. *Id.* at 423. For authority that Congress was given unlimited power to fix qualifications by the Constitution, see *id.* at 423-24 n.1.

93. *Id.* at 421 n.1. One was to make officers and stockholders of the Bank of the United States ineligible, three were to make government contractors ineligible.

1. Senate

As supreme board of the election of its members, the Senate has properly investigated the election conduct of various Senators-elect. For instance, in 1926, the Senate excluded two Senators-elect for exorbitant campaign expenditures⁹⁴ and, in 1946, investigated charges of racism in Theodore Bilbo's successful campaign to be elected Senator from Mississippi.⁹⁵

In another context, the Senate by a majority vote in 1868 refused to permit Phillip F. Thomas of Maryland to take his seat because he had "voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States."⁹⁶ Although there was no evidence of a prior oath, the language of the fourteenth amendment disqualifying one who gives aid and comfort to the enemy in contravention of his oath would probably permit this use of the exclusion power.

There was less justification, however, for the attempted exclusion of Senator William Langer of North Dakota in 1942.⁹⁷ By a vote of 13 to 3, the Senate Committee on Privileges and Elections voted to exclude Langer after hearings on charges of moral turpitude embracing kickbacks, acceptance of a bribe, and conversion of proceeds of legal settlements. The full Senate, however, rejected its committee's resolution to exclude. The Constitution does not permit a house to refuse to seat a member for these reasons. Even to allow a Senate committee to assume jurisdiction of such a case was improper.

2. House of Representatives

The House of Representatives' use of the exclusion power has generally been more questionable than the Senate's. Three examples will bear this out. In 1870 Representative B.F. Whitmore, who had resigned when censured by the House for selling appointments to a military academy, was excluded after his reelection in a special election.⁹⁸ Brigham Roberts was excluded in 1899 for polygamy,⁹⁹ and Adam Clayton Powell was excluded in 1967 for various offenses, including the misuse of public funds and the making of false reports on the expenditures of foreign currency to the Committee on House Administration.¹⁰⁰ In each of these cases, the House unconstitutionally excluded a member-elect for ethical reasons.

94. See text accompanying note 84 *supra*.

95. Senate Cases, *supra* note 36, at 142-44. See also Getz, *supra* note 2, at 97.

96. Senate Cases, *supra* note 36, at 40.

97. *Id.* at 140-41.

98. 1 Hinds, *supra* note 20, § 464.

99. *Id.* §§ 474-80.

100. *Powell v. McCormack*, 395 U.S. 486, 492 (1969). The Powell case was unfortunately

III. PUNISHMENT

Article I, section 5, clause 2 of the Constitution provides: "Each House may . . . punish its Members for disorderly behavior" Of the three disciplinary powers available to Congress, the power to punish for disorderly behavior is the broadest in scope but the least drastic in effect.

A. *Types of Punishment*

Before proceeding with a discussion of the grounds for punishing a member, the types of permissible punishments should be catalogued.

1. Censure

By far the most common method of Congressional punishment is the censure. Although in form a mere resolution of the particular house reprimanding the member for his misconduct, the censure is not an innocuous sanction, having contributed to subsequent election defeats of various members.¹⁰¹ In all, twenty-three members of Congress have been censured, fifteen in the House and eight in the Senate.¹⁰²

2. Suspension

Unlike exclusion and expulsion, suspension entails only a temporary loss of floor privileges (including the right to vote) but not a member's seat itself.¹⁰³ The only recorded instance of an attempt by the Senate to suspend members occurred in 1902 when Senators McLaurin and Tillman were censured for fighting on the floor of the Senate.¹⁰⁴ Suspension poses some special problems which have undoubtedly limited its use. During the period of suspension, a member's constituents are deprived of the services of their representative without the power to send someone else in his place. Suspension then robs a segment of the population of its right to congressional representation.¹⁰⁵

clouded with charges of indiscretions in the Congressman's private life, and with counter-charges of racism and discrimination.

101. For example, censure was a contributing factor in the election defeats of Senators Hiram Bingham (1932) and Thomas Dodd (1970).

102. See Getz, *supra* note 2, at 84-89.

103. See 2 Hinds, *supra* note 20, § 1665.

104. See *id.* Recently a House committee recommended that a member be stripped of his voting rights. See text accompanying note 2 *supra*.

105. The seriousness of suspension was emphasized by a statement made by a President Pro Tempore of the Senate: "The chair desires to say that on Monday last he requested the clerks not to call the names of the two Senators from South Carolina, they being by a resolution of the Senate in contempt of the body. On Tuesday he requested the clerks to read the names in the event there was a roll call. He did this not because he doubted in the least the

3. Imprisonment

It has been argued that "[t]raditional forms of punishment used in criminal law were probably within the contemplation of the framers when they used the term 'punish'"¹⁰⁶ Although imprisonment has never been used by Congress, the Supreme Court has remarked that in a proper case imprisonment of a member would be a permissible punishment.¹⁰⁷ Since certain activities of a Senator or Representative are insulated from the courts,¹⁰⁸ Congress should have the power to adjudicate and punish criminal violations in these protected areas. Of course, imprisonment of a member would prevent him from carrying out his duties to his constituents and raise problems similar to those discussed under suspension.

4. Fine

Prior to 1969, no member of either the House or the Senate had ever been fined or lost his salary. In the Powell imbroglio, however, the House imposed a \$25,000 fine and ordered it paid by monthly salary deductions of \$1,150.¹⁰⁹ The power to fine is a traditional penal sanction and reasonably inferable from the power to punish. It may be a particularly appropriate punishment where a member would not be affected by the more traditional vote of censure.

5. Loss of Seniority

The loss of seniority is a severe punishment for a Senator or a Representative. "[Seniority] is more than a means of choosing committee chairmen; it is a means of assigning members to committees, of choosing subcommittee chairmen and conference committee members. It affects the deference shown legislators on the floor, the assignment of office space, even invitations to dinners."¹¹⁰ Two types of seniority, however, must be distinguished. There is general congressional seniority and party seniority. Only office assignments depend on congressional seniority; party seniority determines committee chairmanships and assignments.¹¹¹ Thus when Adam

propriety of the action he took on Monday. He did it because he recognized that it was a grave question, and he preferred to be in a position where, if it again arose, it could be by him submitted to the decision of the Senate and thus relieve the chair from the responsibility." *Id.*

106. Congress and the Public Trust, *supra* note 8, at 210.

107. *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880).

108. See note 9 *supra*.

109. *Powell v. McCormack*, 395 U.S. 486, 563 n.7 (1969).

110. G. Goodwin, Jr., *The Seniority System in Congress*, in *Congressional Reform, Problems and Prospects* 178-79 (J. Clark ed. 1965).

111. Congress and the Public Trust, *supra* note 8, at 207 (footnote).

For example, House committee chairmen are chosen in the following manner. Rule 10 of

Clayton Powell was deprived of his seniority by the full House in 1969, what was taken away was his general House seniority.¹¹² His party seniority and the chairmanship of the House Education and Labor Committee had previously been taken from him by the House Democratic Caucus.¹¹³ Thus, loss of seniority, while a most effective *party* sanction, is a relatively weak *congressional* sanction.

6. Adverse Publicity

Although not a formal punishment voted by the Senate or House, an investigation of a member's conduct is in itself something of a punishment.¹¹⁴ The adverse publicity attendant upon such an investigation can seriously damage chances for reelection. Whether he had been ultimately censured or not, the mere investigations into Senator Thomas Dodd's conduct undoubtedly prejudiced his chances for reelection.

B. *Procedural Restraints*

1. Punishment as Compared to Expulsion and Exclusion

The critical difference between the power to punish and the power to expel or exclude lies in the very nature of the penalty. Expulsion or exclusion deprives a member of his seat in Congress, while punishment does not. Like exclusion, however, a simple majority may punish; but unlike exclusion, the Constitution does not specify, beyond the use of the term "disorderly behavior," the reasons for which these punishments may be

the Standing Rules of the House states: "At the commencement of each Congress, the House shall elect as chairman of each standing committee one of the Members thereof" In actual fact, the House simply ratifies the decisions which have already been made by the Democrats or Republicans in their respective houses. The sole determining factor in that party determination is seniority. See J. Lindsay, *The Seniority System*, in House Republican Task Force on Congressional Reform and Minority Staffing, *We Propose: A Modern Congress* 23 (1966).

112. See H.R. Res. 2, 91st Cong., 1st Sess. (1969).

113. Congress and the Public Trust, *supra* note 8, at 206.

On January 2, 1965 the Democratic caucus of the House of Representatives had denied seniority rights to Representatives John B. Williams of Mississippi and Albert W. Watson of South Carolina "for having campaigned for Senator Barry M. Goldwater, the 1964 Republican candidate for the Presidency." Goodwin, *supra* note 110, at 180.

This article does not analyze the nature of party sanctions available to either the Democrats or Republicans in Congress. In addition to depriving a member of seniority in the Democratic or Republican ranks, a party could encourage a primary challenge to the member and limit his access to campaign funds distributed by party campaign committees.

114. Both the Senate and the House of Representatives have established their own ethics committees with power to investigate personal misconduct and recommend appropriate action to the full body. See note 22 *supra*.

imposed. In fact, the Constitution does not even mention the types or forms of punishment which may be employed by Congress.

2. Due Process Considerations

As with exclusion and expulsion, Congress should not mete out punishment, of whatever form, in an arbitrary fashion.¹¹⁵ An argument can be made that from the point of view of a member's constituents, the grant of procedural rights in a punishment proceeding is at least as important as in an expulsion or exclusion proceeding. In these latter situations, if convicted, a member will be deprived of his seat, thereby giving his constituents an opportunity to choose a new representative. Punishment, however, will not cause the seat to be vacated, but will undoubtedly curtail a member's effectiveness in Congress and thereby his ability to represent his constituents.

C. Substantive Restraints

1. Grounds for Punishment: Prior Misconduct

Congress' reluctance to expel a member for prior misconduct has not prevented it from punishing a member for prior offenses,¹¹⁶ presumably because punishment of a member for past offenses does not seriously invade the privilege of the people to elect their own representatives. It would seem, however, that Congress should punish a member for prior misconduct only if the offense would have been considered "disorderly behavior" at the time committed.

2. Disorderly Behavior

Article I, section 5 of the Constitution permits each house to punish its members for "disorderly behavior." If the framers of the Constitution left the term "disorderly behavior" purposely vague, both the Senate and House have begun to give it meaning in recently enacted codes of ethics.¹¹⁷ Standing Rule XLIII of the House of Representatives requires, *inter alia*, that a member conduct himself at all times in a manner which shall reflect creditably on the House; to adhere to the spirit and letter of the rules of the House and its committees; to receive no compensation from

115. For John Quincy Adams' demand for the benefit of sixth amendment protection in a censure proceeding, see 2 Hinds, *supra* note 20, § 1255. For a description of what procedural rights might be warranted, see text accompanying notes 21-25 *supra*.

116. Getz, *supra* note 2, at 90. See 2 Hinds, *supra* note 20, § 1236; note 33 *supra*.

117. See the Senate and House Ethics Codes, cited in Congress and the Public Trust, *supra* note 8, appendix D. The impetus for the creation of the Codes of Ethics dates back to the Senate investigation of Robert Baker in 1964. The cases of Senator Thomas Dodd and Congressman Adam Clayton Powell gave additional urgency to the project. For a brief history of the creation of these Codes, see *id.* at 216-21.

any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress; to accept no gift of substantial value from any person or organization having a direct interest in legislation before the Congress; to accept no honorarium for a speech, writing or other activity in excess of the usual and customary value for such services; and to keep his campaign funds separate from his personal funds.¹¹⁸ The House Committee on Standards of Official Conduct is empowered to investigate alleged violations of this code "or of any law, rule, regulation, or other standard of conduct applicable to the conduct of [a] Member . . . in the performance of his duties or the discharge of his responsibilities"¹¹⁹ After such investigation it may recommend appropriate action to the full House.

The Senate's Select Committee on Standards and Conduct is empowered to receive all "complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate"¹²⁰ It may also recommend appropriate disciplinary action to the Senate as a whole.¹²¹

If these codes of ethics signal the beginning of a definition of "disorderly behavior," three things should be noted. First, the rules of both the House and Senate permit punishment of a member for conduct which might reflect badly on the particular house. In the Senate, it is called "improper conduct which may reflect upon the Senate."¹²² In the House, it is called conduct which does not reflect creditably on the House of Representatives.¹²³ Second, each house may punish for violations of law but only if those violations occur *in the performance of a member's official duties*.¹²⁴ Presumably unlawful conduct which is not office-related is not punishable unless it may be considered conduct which tends to discredit a particular house. Third, while the House makes the violation of any of its rules punishable as a breach of its code of conduct,¹²⁵ the Senate seems to

118. *Id.* at 268.

119. Rule XI (19), *id.* at 271.

120. S. Res. 338 § 2(a), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in *Congress and the Public Trust*, *supra* note 8, at 266.

121. *Id.*

122. *Id.*

123. Rules of the House of Representatives, Rule XLIII(1), cited in *Congress and the Public Trust*, *supra* note 8, at 268.

124. See *Congress and the Public Trust*, *supra* note 8, at 228-30.

125. See Rules of the House of Representatives, Rule XI(19), cited in *Congress and the Public Trust*, *supra* note 8, at 271.

punish only violations of its rules which are office-related.¹²⁶ Realistically, however, it might be difficult for a Senator to argue that a violation of a Senate rule was not by its very nature office-related. A study of the actual instances when Congress has punished a member shows that, while both houses have generally followed these guidelines, the Senate and House have on occasion used this power differently.

D. Punishment Cases in the Senate and House of Representatives

1. Senate

In the Senate, punishment for "disorderly behavior" has almost universally been for conduct which, while not unlawful, reflects badly on the Senate or violates its rules. In addition, the proscribed conduct has almost exclusively taken place in the Senate itself or in one of its committees. Thus in the eight cases of senatorial censure, four Senators were punished for fighting on the floor of the Senate,¹²⁷ one for revealing confidential information,¹²⁸ and one for placing a paid lobbyist on the staff of a subcommittee.¹²⁹ The last two Senators to be censured were Senators Joseph McCarthy in 1954, and Thomas Dodd in 1967.

Senator McCarthy was censured on two counts: (a) for his non-cooperation with and abuse of the Subcommittee on Privileges and Elections of the Committee on Rules and Administration during a 1952 investigation of his conduct as a Senator and (b) for abuse of the Select Committee to Study Censure.¹³⁰ Senator Dodd was censured because his conduct was supposedly contrary to accepted morals, detracted "from the public trust expected of a Senator," and tended "to bring the Senate into dishonor and disrepute."¹³¹ The censure resolution also alleged that he had "[exercised] the influence and power of his office . . . to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign. . . ."¹³² Dodd represents the only Senator censured for conduct which was not directly connected with the workings of the Senate.

126. See S. Res. 338 § 2(a)(1), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in Congress and the Public Trust, *supra* note 8, at 266.

127. Thomas H. Benton of Missouri and Henry S. Foote of Mississippi (1850), Senate Cases, *supra* note 36, at 15-16; John L. McLaurin and Benjamin R. Tillman of South Carolina (1902), *id.* at 94-97.

128. Benjamin Tappan of Ohio (1844), *id.* at 11-13.

129. Hiram Bingham of Connecticut (1929), *id.* at 125-27.

130. *Id.* at 152-54.

131. Congress and the Public Trust, *supra* note 8, at 226.

132. *Id.* at 226-27.

2. House of Representatives

While the Senate censures for conduct which reflects discredit upon that body, the House has usually censured members for conduct which was both illegal and office-related. Of the fifteen instances of House censures, six cases have involved either bribery or the sale of appointments to military academies.¹³³ In all of these cases, the House committee investigating the facts voted or would have voted to expel; the full House chose rather to censure.¹³⁴ Two Representatives have also been censured for speaking allegedly treasonable words.¹³⁵ The House, however, has in some cases censured for conduct which tends to discredit it. These cases have generally involved the use of unparliamentary language;¹³⁶ one Representative, however, was censured for having placed an obscene letter in the Congressional Record.¹³⁷ As for types of punishment other than censure, the House has fined and stripped one of its members of seniority for allegedly misusing public funds.¹³⁸

IV. CONCLUSION

From this analysis, it is clear that definite procedural and substantive rules do exist to guide Congress in the exercise of each of its disciplinary powers. Members are in no sense at the "unbridled discretion" of their colleagues. Congress has begun to show increased sensitivity towards criticism of the conduct of its members, and recent instances of alleged misconduct by certain members of Congress may result in Congress' disciplining members more frequently than in the past. Thus the limitations on Congress' power to expel, to exclude and to punish are likely to come under increased scrutiny.

133. See Getz, *supra* note 2, at 86 (Table I).

134. *Id.*

135. 2 Hinds, *supra* note 20, §§ 1253-54.

136. *Id.* §§ 1246-49, 1251.

137. Getz, *supra* note 2, at 85.

138. See text accompanying notes 109, 112 *supra*.

APPENDIX

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOE ET AL. *v.* McMILLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-6356. Argued December 13, 1972—Decided May 29, 1973

Petitioners, parents of District of Columbia (D. C.) school children, brought this action seeking damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from the dissemination of a congressional report on the D. C. school system that included identification of students in derogatory contexts. The named defendants included members of a House committee, Committee employees, a Committee investigator, and a consultant; the Public Printer and the Superintendent of Documents; and officials and employees connected with the school system. The Court of Appeals affirmed the District Court's dismissal of the complaint on the grounds that the first two categories of defendants were immune by reason of the Speech or Debate Clause, and that the D. C. officials and the legislative employees were protected by the official immunity doctrine recognized in *Barr v. Matteo*, 360 U. S. 564. *Held*:

1. The congressional committee members, members of their staff, the consultant, and the investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in the legislative acts of compiling the report, referring it to the House, or voting for its publication. Pp. 4-7.

2. The Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform the function, which is not part of the legislative process, of publicly distributing materials that allegedly infringe upon the rights of individuals. The Court of Appeals, therefore, erred in holding that respondents who (except for the Committee members and personnel) were charged with such public distribution were protected by the Clause. Pp. 7-10.

3. The Public Printer and the Superintendent of Documents are protected by the doctrine of official immunity enunciated in

Syllabus

Barr v. Matteo, supra, for publishing and distributing the report only to the extent that they served legitimate legislative functions in doing so, and the Court of Appeals erred in holding that their immunity extended beyond that limit. Pp. 10-17.

— U. S. App. D. C. —, 459 F. 2d 1304, reversed in part, affirmed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which STEWART, J., joined.

NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

<p>John Doe et al., Petitioners, v. John L. McMillan et al.</p>	}	<p>On Writ of Certiorari to the United States Court of Ap- peals for the District of Columbia Circuit.</p>
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[May 29, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr v. Matteo*, 360 U. S. 564 (1959); *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

report, H. R. Rep. No. 91-1681, 91st Cong., 2d Sess. (1970), represented to be a summary of the Subcommittee's investigation and hearings devoted to the public school system of the District of Columbia. On the same day, the report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Cong. Rec. 40311 (1970). Thereafter, the report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.

The 450-page report included among its supporting data some 45 pages that are the gravamen of petitioners' suit. Included in the pertinent pages were copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically-named students.¹ The report stated that these materials were included to "give a realistic view" of a troubled school and "the lack of administrative efforts to rectify the multitudinous problems there," to show the level of reading ability of seventh graders who were given a fifth-grade history test, and to illustrate suspension and disciplinary problems.²

On January 8, 1971, petitioners, under pseudonyms, brought an action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all other children and parents similarly situated. The named defendants were (1) the Chair-

¹ The Court of Appeals' opinion terms the materials "somewhat derogatory." The absentee lists named students who were frequent "class cutters." Of the 29 test papers published in the report, 21 bore failing grades; all included the name of the student being tested. The letters, memoranda, and other documents relating to disciplinary problems detailed conduct of specifically named students. Some of the deviant conduct described involved sexual perversion and criminal violations.

² The information was obtained voluntarily from District of Columbia school personnel by Committee investigators.

man and members of the House Committee on the District of Columbia; (2) the Clerk, Staff Director, and Counsel of the Committee; (3) a consultant and an investigator for the Committee; (4) the Superintendent of Documents and the Public Printer; (5) the President and members of the Board of Education of the District of Columbia; (6) the Superintendent of Public Schools of the District of Columbia; (7) the principal of Jefferson High School and one of the teachers at that school; and (8) the United States of America.

Petitioners alleged that, by disclosing, disseminating, and publishing the information contained in the report, the defendants had violated the petitioners' and their children's statutory, constitutional, and common law rights to privacy and that such publication had caused and would cause grave damage to the children's mental and physical health and to their reputations, good names, and future careers. Petitioners also alleged various violations of local law. Petitioners further charged that "unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students." The complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report containing the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation. Petitioners also asked for compensatory and punitive damages.³

The District Court, after a hearing on motions for a temporary restraining order and for an order against

³ The prayer also included a request for an injunction prohibiting future disclosure of "confidential information" and requiring the District of Columbia School Board "to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia."

further distribution of the report, dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged.⁴ A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. Without determining whether the complaint stated a cause of action under the Constitution or any applicable law, the majority held that the Members of Congress, the Committee staff employees, and the Public Printer and Superintendent of Documents were immune from the liability asserted against them because of the Speech or Debate Clause and that the official immunity doctrine recognized in *Barr v. Matteo, supra*, barred any liability on the part of the District of Columbia officials as well as the legislative employees.⁵ We granted certiorari, 408 U. S. 922.

I

To "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel v. United States*, 408 U. S. 606, 617 (1972), Art. I, § 6, cl. 1, of the Constitution provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

"The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without

⁴ The District Court also dismissed the suit against the United States for failure to exhaust administrative remedies. 28 U. S. C. § 2675 (a). That ruling is not challenged here.

⁵ The Court of Appeals also independently found that injunctive relief would not issue because of assurances from the federal defendants that no republication or further distribution of the Report was contemplated. With respect to petitioners' request for injunctive relief against the District of Columbia officials, the Court found that, because of the adoption of new policies concerning confidential information, "there is no substantial threat of future injury to appellants."

intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel v. United States*, *supra*, at 616.⁶

The Speech or Debate Clause has been read "broadly to effectuate its purposes," *United States v. Johnson*, 383 U. S. 169, 180 (1966); *Gravel v. United States*, *supra*, at 624, and includes within its protections anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1880); *United States v. Johnson*, *supra*, at 179; *Gravel v. United States*, *supra*, at 624; *Powell v. McCormack*, 395 U. S. 486, 502 (1969); *United States v. Brewster*, 408 U. S. 501, 509, 512-513 (1972). Thus "voting by Members and committee reports are protected" and "a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'" *Gravel v. United States*, *supra*, at 624.

Without belaboring the matter further, it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the committee staff, from the consultant, or from the investigator, for introducing material at committee hearings that

⁶ "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *United States v. Brewster*, 408 U. S. 501, 508 (1972).

identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were "legislative acts," *Gravel v. United States*, *supra*, at 618, and, as such, were immune from suit.⁷

Petitioners argue that including in the record of the hearings and in the Report itself materials describing particular conduct on the part of identified children was actionable because unnecessary and irrelevant to any legislative purpose. Cases in this Court, however, from *Kilbourn* to *Gravel* pretermitt the imposition of liability on any such theory. Congressmen and their aides are immune from liability for their actions within the "legislative sphere," *Gravel v. United States*, *supra*, at 624-625, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes. Although we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the evidence submitted to the Committee and in the Committee Report, we have no authority to oversee the judgment of the Committee in this respect or to impose liability on them if we disagree with their legislative judgment. The acts of authorizing an investigation pursuant to

⁷ In *Gravel*, we held that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel v. United States*, 408 U. S., at 618.

which the subject materials were gathered, holding hearings where the materials were presented, preparing a Report where they were reproduced, and authorizing the publication and distribution of that Report were all “integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” *Id.*, at 625. As such, the acts were protected by the Speech or Debate Clause.

Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. “[T]he Clause has not been extended beyond the legislative sphere,” and “[l]egislative acts are not all-encompassing.” *Id.*, at 624–625. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct “though generally done, is not protected legislative activity.” *Id.*, at 625; *United States v. Johnson*, *supra*. Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel v. United States*, *supra*.

The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals. The respondent insists that such public distributions are protected, that the Clause immunizes not only publication for the information and use of Members in the performance of their

legislative duties but also must be held to protect "publications to the public through the facilities of Congress." Public dissemination, it is argued, will serve "the important legislative function of informing the public concerning matters pending before Congress" Brief for Legislative Respondents, p. 27.

We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, simply because authorized by Congress, must always be considered "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislative or other matters before the House. *Gravel v. United States*, *supra*, at 625. A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report.⁸ The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process "by which members participate in committee and House proceedings." *Gravel v. United States*, *supra*, at 625. By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distributions of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity.

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reason-

⁸ The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected. See generally Harper & James, *The Law of Torts*, § 5.18 (1956); Prosser, *Torts*, 766-769 (4th ed. 1971). See also *Gravel v. United States*, 408 U. S., at 622-627.

able requirements of the legislative function, *Kilbourn v. Thompson*, *supra*, but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the sergeant-at-arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." *Id.*, at 200.⁹ See also *Powell v. McCormack*, 395 U. S., at 504; cf. *Dombrowski v. Eastland*, 387 U. S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel v. United States*, *supra*, at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function.¹⁰

⁹ "In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel v. United States*, 408 U. S., at 618.

¹⁰ Although, as pointed out by my dissenting Brethren, the acts of Senator Gravel were not ordered or authorized by Congress or a congressional committee, *Gravel v. United States*, 408 U. S., at 626, the fact of congressional authorization for the questioned act is not sufficient to insulate the act from judicial scrutiny. In *Powell v. McCormack*, 395 U. S. 486 (1969), for instance, we reviewed the acts of House employees "acting pursuant to express orders of the House." *Id.*, at 504. We concluded that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Ibid.* See also *Kilbourn v.*

Thus we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be. We cannot believe that the purpose of the Clause—"to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel v. United States*, *supra*, at 617; *Powell v. McCormack*, *supra*, at 502; *United States v. Johnson*, *supra*, at 181—will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws.¹¹ To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law.

Contrary to the suggestion of our dissenting Brethren, we cannot accept the proposition that our conclusion,

Thompson, 103 U. S. 168 (1881); *Dombrowski v. Eastland*, 387 U. S. 82 (1967).

¹¹ We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution.

that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the "informing function" of Congress. To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public. We only deal, in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the "*due* functioning of the [legislative] process." *United States v. Brewster, supra*, at 516.

That the Speech or Debate Clause has finite limits is important for present purposes. The complaint before us alleges that the respondents caused the committee report "to be distributed to the public," that "distribution of the report continues to the present," and that "unless restrained, defendants will continue to distribute and publish" damaging information about petitioners and their children. It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the Report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for a suit. The complaint was therefore properly dismissed as to these respondents. Other respondents, however, are alleged to have carried out a public distribution and to be ready to continue such dissemination.

In response to these latter allegations, the Court of Appeals, after receiving sufficient assurances from the respondents that they had no intention of seeking a republication or carrying out further distribution of the report, concluded that there was no basis for injunctive relief. But this left the question whether any part of the previous publication and public distribution by respondents other than the Members of Congress and Committee personnel went beyond the limits of the legislative immunity provided by the Speech or Debate Clause of the Constitution. Until that question was resolved, the complaint should not have been dismissed on threshold immunity grounds, unless the Court of Appeals was correct in ruling that the action against the other respondents was foreclosed by the doctrine of official immunity, a question to which we now turn.¹²

II

The official immunity doctrine, which "has in large part been of judicial making," *Barr v. Matteo*, 360 U. S. 564, 569 (1959), confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effec-

¹² While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress, see, *e. g.*, *Kilbourn v. Thompson*, *supra*; *Domrowski v. Eastland*, *supra*, even when the Executive Branch is also involved, see, *e. g.*, *United States v. Brewster*, *supra*; *Gravel v. United States*, *supra*.

tive administration of policies of government." *Id.*, at 571.¹³ The official immunity doctrine seeks to reconcile two important considerations—

"[O]n the one hand, the protection of the individual citizens against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Id.*, at 565.

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes. *Id.*, at 573; see also *Tenney v. Brandhove*, 341 U. S., at 378; *Dombrowski v. Eastland*, 387 U. S. 82, 85 (1967). Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. *Barr v. Matteo*, *supra*, at 569; *Pierson v. Ray*, 386 U. S. 547, 553–555 (1967). But policemen and like officials apparently enjoy a more limited privilege. *Id.*, at 555–558. Also, the Court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. *Barr v. Matteo*, *supra*, at 573–574; see also the companion case, *Howard v. Lyons*, 360 U. S. 593, 597–598 (1959). The scope of immunity has always been tied to the "scope of authority." *Wheeldin v. Wheeler*, 373 U. S. 647, 651 (1963). In the legislative

¹³ Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch. See *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Dombrowski v. Eastland*, 387 U. S. 82 (1967).

context, for instance, "[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney v. Brandhove*, *supra*, at 377. Thus, we have recognized "the immunity of legislators for acts within the legislative role," *Pierson v. Ray*, *supra*, at 554 (1967), but have carefully confined that immunity to protect only acts within "the sphere of legitimate legislative activity." *Tenney v. Brandhove*, *supra*, at 376; cf. *Powell v. McCormack*, *supra*, at 486.

Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweighs the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents—the Public Printer and the Superintendent of Documents—should be accorded absolute immunity in this case. Of course, to the extent that they serve legislative functions, the performance of which would be immune conduct if done by congressmen, these officials enjoy the protection of the Speech or Debate Clause. Our inquiry here, however, is whether, if they participate in publication and distribution beyond the legislative sphere, and thus beyond the protection of the Speech or Debate Clause, they are nevertheless protected by the doctrine of official immunity. Our starting point is at least a minimum familiarity with their functions and duties.

The statutes of the United States create the office of Public Printer to manage and supervise the Government Printing Office, which, with certain exceptions, is the authorized printer for the various branches of the Federal Government. 44 U. S. C. § 301. "Printing and binding may be done at the Government Printing Office only when authorized by law." § 501. The Public Printer

is authorized to do printing for Congress, §§ 701-741, 901-910, as well as for the Executive and Judicial Branches of Government, §§ 1101-1123. The Public Printer is authorized to appoint the Superintendent of Documents with duties concerning the distribution and sale of documents. §§ 1701-1722.

Under the applicable statutes, when either House of Congress orders a document printed, the Printer is to print the "usual number" unless a greater number is ordered. § 701. The "usual number" is 1,682, to be divided between bound and unbound copies and distributed to named officers or offices of the House and Senate, to the Library of Congress, and to the Superintendent of Documents for further distribution "to the State libraries and designated depositories." *Ibid.*¹⁴ There are also statutory provisions for the printing of extra copies, § 702, bills and resolutions, § 706-708, public and private laws, postal conventions, and treaties, §§ 709-712, journals, § 713, the Congressional Directory, § 721-722, memorial addresses, § 723-724, and the Statutes at Large, § 728-729. Section 733 provides that "[t]he Public Printer on order of a Member of Congress, on prepayment of costs, may reprint documents and reports of committees together with the evidence papers submitted, or any part ordered printed by the Congress."

With respect to printing for the Executive and Judicial Branches, it is provided that "[a] head of an executive department . . . may not cause to be printed, and the Public Printer may not print, a document or matter unless it is authorized by law and necessary to the public business." § 1102 (a). The executive departments and

¹⁴ For the authorization to supply sufficient copies for such distribution see § 738. The Public Printer is also required to furnish the Department of State with 20 copies of all congressional documents and reports. 44 U. S. C. § 715.

the courts are to requisition printing by certifying that it is "necessary for the public service." § 1103.

The Superintendent of Documents has charge of the distribution of all public documents except those printed for use of the executive departments, "which shall be delivered to the departments," and for either House of Congress, "which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service." § 1702. He is thus in charge of the public sale and distribution of documents. The Public Printer is instructed to "print additional copies of a Government publication, not confidential in character, required for sale to the public by the Superintendent of Documents," subject to regulation by the Joint Committee on Printing. § 1705.

It is apparent that under this statutory framework, the printing of documents and their general distribution to the public would be "within the outer perimeter" of the statutory duties of the Public Printer and the Superintendent of Documents. *Barr v. Mateo, supra*, at 575. Thus, if official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule.

The duties of the Public Printer and his appointee, the Superintendent of Documents, are to print, handle, distribute, and sell government documents. The Government Printing Office acts as a service organization for the branches of the Government. What it prints is produced elsewhere and is printed and distributed at the direction of the Congress, the departments, the independent agencies and offices, or the Judicial Branch of the Government. The Public Printer and Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and ad-

justing the supply accordingly. The existence of a Public Printer makes it unnecessary for every government agency and office to have a printer of its own. The Printing Office is independently created and manned and imbued with its own statutory duties; but, we do not think that its independent establishment carries with it an independent immunity. Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the material. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would not otherwise hold immune if not sufficiently connected with the "official duties" of the department. *Howard v. Lyons*, 360 U. S., at 597.

Congress has conferred no express, statutory immunity on the Public Printer or the Superintendent of Documents. Congress has not provided that these officials should be immune for printing and distributing materials where those who author the materials would not be. We thus face no statutory or constitutional problems in interpreting this doctrine of "judicial making." *Barr v. Matteo*, 360 U. S., at 569. We do, however, write in the shadow of *Bd. of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), and *Wisconsin v. Constantineau*, 400 U. S. 433 (1971), where the Court advised caution "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him" *Id.*, at 437. We conclude that, for

the purposes of the judicially fashioned doctrine of immunity, the Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski v. Eastland*, 387 U. S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U. S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings.¹⁵ We are unaware, from this record, of the extent of the publication and distribution of the Report which has taken place to date. Thus we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.

Of course, like the Court of Appeals, we indicate nothing as to whether petitioners have pleaded a good cause of action or whether respondents have other defenses,

¹⁵ With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect.

constitutional or otherwise. We have dealt only with the threshold question of immunity.¹⁶

The judgment of the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

So ordered.

¹⁶ We thus have no occasion to consider Art. I, § 5, cl. 3, which requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."; nor need we deal with publications of the Judicial Branch and the legal immunities that may be attached thereto.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,	}	On Writ of Certiorari to the United States Court of Ap- peals for the District of Columbia Circuit.
Petitioners,		
v.		
John L. McMillan et al.)		

[May 29, 1973]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel v. United States*, 408 U. S. 606, urge that the Report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.¹ In *Gravel* we held that neither Senator Gravel nor his aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either

¹ That Clause in relevant part provides:

" . . . and for any Speech or Debate in either house, [Senators and Representatives] shall not be questioned in any other Place."

House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials.”² *Id.*, at 626 n. 16.

“Legislative immunity does not, of course, bar all judicial review of legislative acts.” *Powell v. McCormack*, 395 U. S. 486, 503. “The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.” *Id.*, at 505. This has been clear since Chief Justice Marshall’s seminal decision in *Marbury v. Madison*, 1 Cranch. 137. We always have recognized the “judicial power to determine the validity of legislative actions impinging on individual rights.” *Gravel v. United States*, *supra*, at 620.

In *Kilbourn v. Thompson*, 103 U. S. 168, the Court’s first decision to consider the Speech or Debate Clause, the Court held unconstitutional a resolution of the House ordering the arrest of Kilbourn for refusing to honor a subpoena of a House investigating committee, since the House had no power to punish for contempt. Although the Court barred a claim for false imprisonment against Members of the House, it nevertheless reached the merits of Kilbourn’s claim and allowed an action against the House’s Sergeant At Arms, who had executed the warrant for Kilbourn’s arrest.

Dombrowski v. Eastland, 387 U. S. 82, involved suits for an injunction and for damages against a Senator who headed a subcommittee of the Senate Judiciary Committee and counsel to the subcommittee for wrongful and unlawful seizure of property in violation of the Fourth

² The Committee report was transmitted to the House by the Chairman of the Committee, was referred to the Calendar of the Committee of the Whole House on the State of the Union, and was ordered to be printed.

Amendment. We agreed that the complaint against the Senator must be dismissed because the record "does not contain evidence of his involvement in any activity that could result in liability." *Id.*, at 84. As respects counsel to the subcommittee we held, in reliance on *Tenney v. Brandhove*, 341 U. S. 367, that the immunity granted by the Speech or Debate Clause "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." 387 U. S., at 85. Accordingly, we remanded the case against counsel to the subcommittee for trial because there was "a sufficient factual dispute" to require a trial. Acts done in violation of the Fourth Amendment—like assaults with fists or clubs or guns—are outside the protective ambit of the Speech or Debate Clause; *certainly violations of the Fourth Amendment are not within the scope of a legitimate legislative purpose.*

A striking illustration of the same principle was stated in *Watkins v. United States*, 354 U. S. 178, 188: "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." And see *Barenblatt v. United States*, 360 U. S. 109, 153, 166 (dissenting opinions). A witness subpoenaed to testify before a congressional committee may not be forced to reveal his beliefs. One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values. And, as *Watkins* indicates, a witness refusing to so testify may not be punished for contempt. *Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose.*

I cannot agree, then, that the question for us is "whether [public dissemination], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House." A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating. See *Gravel v. United States*, *supra*, at 634-637 (DOUGLAS, J., dissenting), 649-662 (BRENNAN, J., dissenting). In my view the question to which we should direct our attention is whether the House Report infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts.

II

The House authorized its District Committee "to conduct a full and complete investigation and study of . . . (1) the organization, management, operation and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation and administration of any independent agency or instrumentality of government operating solely in the District of Columbia."³

It was pursuant to this investigation and study that the Report in effect brands certain named students as juve-

³ H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784.

nile delinquents. As stated by Judge Wright in his dissent below:

"The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, vandalism, assault and theft. Of the 29 test papers published in the report, 21 bore failing grades. Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity." 459 F. 2d 1304, 1324.

We all should be painfully aware of the potentially devastating effects of congressional accusations. There are great stakes involved when officials condemn individuals by name. The age of technology has produced data banks into which all social security numbers go; and following those numbers go data in designated categories concerning the lives of members of our communities. Arrests go in, though many arrests are unconstitutional. Acts of juvenile delinquency are permanently recorded and they and other alleged misdeeds or indiscretions may be devastating to a person in later years when he has outgrown youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.

Congress, in naming the students without justification exceeded the "sphere of legitimate legislative activity." *Tenney v. Brandhove, supra*, at 376. There can be no question that the resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any "congressional power to expose for the sake of exposure." *Watkins v. United States, supra*, at 200. To the contrary, there is simply "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." *Id.*, at 187. The names of specific students were totally irrelevant to the purposes of the study. The functions of the Committee would have been served equally well if the students had remained anonymous.

It is true, of course, that members of Congress may, even in a case such as this, retain their immunity under the Speech or Debate Clause. But in this case, both the Public Printer and the Superintendent of Documents, official agencies entrusted by Congress with printing responsibilities, are named as defendants. And in the context of this case, such defendants may be held responsible for their actions. See *Powell v. McCormack, supra*; *Dombrowski v. Eastland, supra*; *Kilbourn v. Thompson, supra*.

At the very least petitioners are entitled to injunctive relief. The scope of the injunction and against whom it should operate only can be determined upon remand after a full hearing on the facts. We cannot say whether there is a threat of future public distribution or whether it will be feasible for any person subject to the equitable powers of the court to excise the students' names from Reports previously distributed. With respect to damages—that is, whether respondents, including the mem-

bers of the District of Columbia government if a valid claim is stated against them, are protected by the doctrine of official immunity as set forth in the opinion for the Court—I agree that it is a matter for the lower courts in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,	}	On Writ of Certiorari to the
Petitioners,		United States Court of Ap-
v.		peals for the District of
John L. McMillan et al.	}	Columbia Circuit.

[May 29, 1973]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I cannot accept the proposition that the judiciary has power to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution. The inquiries conducted by Congress here were within its broad legislative authority and the specific powers conferred by cl. 17, § 8, Art. I.

It seems extraordinary to me that we grant to the staff aides of Members of the Senate and the House an immunity that the Court today denies to a very senior functionary, the Public Printer. Historically and functionally the Printer is simply the extended arm of the Congress itself, charged by law with executing congressional commands.

Very recently, in *United States v. Brewster*, 408 U. S. 501, 516 (1972), we explicitly took note of the "conscious choice" made by the authors of the Constitution to give broad privileges and protection to Members of Congress for acts within the scope of their legislative function. As JUSTICES BLACKMUN and REHNQUIST have demonstrated so well, the acts here complained of were not outside the traditional legislative function of Congress. I join fully in the concurring and dissenting opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST, *post*, —.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,	}	On Writ of Certiorari to the United States Court of Ap- peals for the District of Columbia Circuit.
Petitioners,		
v.		
John L. McMillan et al.		

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST'S opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

floor. *Gravel v. United States*, 408 U. S. 606, 617, 624 (1972); *Powell v. McCormack*, 395 U. S. 486, 502 (1969); *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1881).¹ That protection is preserved by the Court in this case, *ante*, pp. 5-7, because the Court appreciates that Congress must possess uninhibited internal communication.

The Court previously has observed that Congress possesses the power "to inquire into and publicize corruption, maladministration or inefficiency in the agencies of the Government" because the public is "entitled to be informed concerning the workings of its government." *Watkins v. United States*, 354 U. S. 178, 200 and n. 33 (1957). Indeed, as to this kind of activity, Woodrow Wilson long ago observed, "The informing function of Congress should be preferred even to its legislative function."² The Speech or Debate Clause is an outgrowth

¹ We are to read the Speech or Debate Clause "broadly to effectuate its purposes." *United States v. Johnson*, 383 U. S. 169, 180 (1966); *Gravel v. United States*, 408 U. S. 606, 624 (1972). The "central role" of the Clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel v. United States*, *supra*, 408 U. S., at 617. The breadth of coverage of the Speech or Debate Clause must be no less extensive than the legislative process it is designed to protect, for the Clause insures for Congress "wide freedom of speech, debate, and deliberation without intimidation from the Executive Branch," *Gravel v. United States*, 408 U. S., at 616, or, I might suppose, from the judiciary.

² "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be pre-

of the English doctrine that the courts should not be utilized as instruments to impede the efficient functioning of Parliament. *Kilbourn v. Thompson*, 103 U. S., at 201-205. Because the "informing function" is an essential attribute of an effective Legislative Branch, I feel the Court's curtailment of that function today violates the historical tradition signified textually by the Speech or Debate Clause and underlying our doctrine of separation of powers.

It may be that a congressional committee's activities and report are not protected absolutely by the Speech or Debate Clause. One may assume that there must be a legitimate legislative purpose in undertaking the investigation or hearing that culminates in the report. *Watkins v. United States*, 354 U. S., at 200; *Barenblatt v. United States*, 360 U. S. 109 (1959). I suggest, however, that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation," *Gravel v. United States*, 408 U. S., at 625, as is the gathering of information or writing and voting for the publication of the report. In the case before us, there can be no question that the activities of the District of Columbia Committee of the House of Representatives were officially authorized and undertaken for a proper legislative purpose. Plenary jurisdiction over the District of Columbia is specifically vested

ferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration," W. Wilson, *Congressional Government*, 303 (1895).

in Congress by Art. I, § 8, of the Constitution.³ Matters such as the quality of education afforded by the District's schools, and the administrative problems they face, obviously are within the scope of the jurisdiction of the District Committee. In this case, it legitimately undertook its investigation of the administration of the school system.⁴ At the conclusion of its investigation the Committee decided, as did the Committee of the Whole House on the State of the Union,⁵ that, as a matter of legislative judgment, the report should be printed. It was stated that attachments to one portion thereof were included to "give a realistic view" of a troubled school "and the lack of administrative efforts to rectify the multitudinous problems there."⁶ The report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.⁷ This decision,

³ Article I, § 8:

"The Congress shall have Power . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ."

⁴ House Resolution 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969), authorized the Committee, "as a whole or by subcommittee . . . to conduct a full and complete investigation" of the "organization, management, operation, and administration of any department or agency," and of "any independent agency or instrumentality" of government in the District of Columbia.

⁵ 116 Cong. Rec. 40311 (1970).

⁶ H. R. Rep. No. 91-1681, 91st Cong., 2d Sess., 212 (1970).

⁷ The Court notes, *ante*, p. 17, apparently in alleviation of its conclusion as to possible liability, that a specific statutory grant of immunity to the Public Printer and the Superintendent of Documents relieving them of personal liability for the distribution of an unprotected document has not been conferred. But it is not clear how, if liability otherwise exists, such a grant of immunity would shield these public servants in a case involving alleged constitutional

though reasonable men well may differ as to its wisdom, was a conscious exercise of legislative discretion constitutionally vested in the Legislative Branch and not subject to review by the judiciary. Indeed, as MR. JUSTICE REHNQUIST observes, *post*, p. 2, this Court has stated that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951).

Although the Court in the present case holds that the gathering of information, the preparation of a report, and the voting on a resolution authorizing the printing of a committee report are protected activities under the Speech or Debate Clause, it renders that protection for Members of Congress and legislative personnel less than meaningful by further holding that the authorized public distribution of a committee document may be enjoined and those responsible for the distribution held liable when the document contains materials "otherwise actionable under local law." *Ante*, p. 10. The Court's holding thus imposes on Congress the onerous burden of justifying, apparently by "substantial evidence," *ibid.*, the inclusion of allegedly actionable material in committee documents.⁸ This, unfortunately, ignores the realities

violations. Thus, the Court has placed the Public Printer and Superintendent of Documents in the untenable position either of accepting the risk of personal liability, whenever a congressional document officially is printed and distributed, or of violating the specific command of a congressional resolution ordering the printing and distribution.

⁸ An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante*, p. 19, n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of

of the "deliberative and communicative processes," *Gravel v. United States*, 408 U. S., at 625, by which legislative decisionmaking takes place.

Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process,⁹ the very act of determining judicially whether there is "substantial evidence" to justify the inclusion of "actionable" information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech or Debate Clause¹⁰ and is, as well, the imposition of this Court's judgment in matters textually committed to the discre-

the Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, providing that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."

⁹ Only last Term, in *United States v. Brewster*, 408 U. S. 501, 516-517 (1972), the Court emphasized that

"In its narrowest scope, the [Speech or Debate] Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

¹⁰ I do not reach the question whether the withholding of information from the public with respect to matters being considered by elected representatives in any way diminishes protected First Amendment values.

tion of the Legislative Branch by Art. I of the Constitution. I suspect that Chief Justice Marshall and his concurring Justices would be astonished to learn that the time-honored doctrine of judicial review they enunciated in *Marbury v. Madison*, 1 Cranch 137 (1803), has been utilized to foster the result reached by the Court today.¹¹

Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents in accord with this Court's concept of wise legislative decisionmaking policy appears to me to reveal a lack of confidence in our political processes and in the ability of Congress to police its own members. It is inevitable that occasionally, as perhaps in this case, there will be unwise and even harmful choices made by Congress in fulfilling its legislative responsibility. That, however, is the price we pay for representative government. I am firmly convinced that the abuses we countenance in our system are vastly outweighed by the demonstrated ability of the political process to correct overzealousness on the part of elected representatives.

¹¹ "The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor congressional language they think libelous. We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem." *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731-732 (DC 1956 (three-judge court)).

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,	}	On Writ of Certiorari to the
Petitioners,		United States Court of Ap-
v.		peals for the District of
John L. McMillan et al.	}	Columbia Circuit.

[May 29, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, and with whom MR. JUSTICE STEWART joins as to Part I, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

I

In *Gravel v. United States*, 408 U. S. 606 (1972), we decided that the Speech or Debate Clause of the Constitution did not protect private republication of a committee report, but left open the question of whether publication and public distribution of such reports au-

thorized by Congress would be included within the privilege. 408 U. S., at 626 n. 16. While there are intimations in today's opinion that the privilege does not cover such authorized public distribution, the ultimate holding is apparently that the District Court must take evidence and determine for itself whether or not such publication in this case was within the "legitimate legislative needs of Congress," *ante*, at 18.

While there is no reason for a rigid, mechanical application of the Speech or Debate Clause, there would seem to be equally little reason for a completely *ad hoc*, factual determination in each case of public distribution as to whether that distribution served the "legitimate legislative needs of Congress." A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed. This disposition is particularly anomalous when viewed in light of our earlier views on the scope of the constitutional privilege to the effect that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951). A factual hearing in the District Court could scarcely avoid inquiry into legislative motivation.

Previous decisions of this Court have upheld the immunity of Members whenever they are "acting in sphere of legitimate legislative activity." *Tenney v. Brandhove*, *supra*, 341 U. S., at 376. In *Kilbourn v. Thompson*, 103 U. S. 168 (1880), we held that this immunity extends to everything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204. This relatively expansive interpretation of the scope of immunity has been consistently reaffirmed. *United States v. Johnson*, 383 U. S. 169, 179 (1966); *United States v. Brewster*, 408 U. S. 501, 509 (1972).

The subject matter of the Committee Report here in question was, as the Court notes, concededly within the legislative authority of Congress. Congress has jurisdiction over all matters within the District of Columbia, U. S. Const., Art. I, § 8, cl. 17, and the Committee was authorized by the full House to investigate the District's public school system. H. R. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969). And we have held that with respect to the preliminary inquiries, such as the findings here represent, concerning potential legislation, Congress' power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U. S. 109, 111 (1959).

In *Kilbourn v. Thompson*, *supra*, 103 U. S., at 204, *Powell v. McCormack*, 395 U. S. 486, 502 (1969), and *Gravel v. United States*, *supra*, 408 U. S., at 624, the Court has held that committee reports are absolutely privileged. In neither *Kilbourn* nor *Powell* was any distinction intimated between internal and public distribution of the reports. And while the question was reserved in *Gravel*, a comparison of the factual background surrounding Senator Gravel's reading into the committee record, the Pentagon Papers, and the limited publication apparently undertaken here, indicates that the difference in actual effect between the two is indeed minimal. The only difference between Senator Gravel's widely publicized reading, in the presence of numerous spectators and journalists, and the public distribution of this report, is that the former was confined within the legislative halls. But it can scarcely be doubted that information produced at a publicly attended committee hearing within the legislative halls may well as a practical matter receive every bit as much public circulation as information contained in a committee report which is itself publicly circulated.

To the extent that public participation in a relatively open legislative process is desirable, the Court's holding makes the materials bearing on that process less available than they might be. And the limitation thus judicially imposed is squarely contrary to the expressed intent of Congress. The Committee Report was ordered printed by the full House sitting as a Committee of the Whole. 116 Cong. Rec. H. 11347 (Dec. 8, 1970). It was thereafter printed and distributed by the Government Printing Office solely in accordance with statutory provisions. 44 U. S. C. §§ 501, 701 (1970). These provisions state specifically that the Public Printer may print only the number of copies designated by the Congress, such number, in the absence of contrary indication, being "the usual number" established by statute as 1,682. These copies may be distributed only "among those entitled to receive them." *Id.*, at § 701 (a). The distributees are specifically designated in the statute itself. *Id.*, at § 701 (c). Extra copies may be printed only by simple, concurrent, or joint resolution. *Id.*, at § 703. Thus every action taken by the Public Printer and the Superintendent of Documents, so far as this record indicates, was under the direction of Congress.

I agree with the Court that the Public Printer and the Superintendent of Documents have no "official immunity" under the authority of *Barr v. Matteo*, 360 U. S. 564 (1959). There is no immunity there when officials are simply carrying out the directives of officials in the other branches of government, rather than performing any discretionary function of their own. But for this very reason, if the body directing the publication or its Members would be immune from themselves publishing and distributing, the Printer and the Superintendent should be likewise immune. I do not understand the Court to hold otherwise. Because I would hold the Members immune had they undertaken the public distribution, I

would likewise hold the Superintendent and the Printer immune for having done so under the authority of the resolution and statute. The Court's contrary conclusion, perhaps influenced by the allegations of serious harm to the petitioners contained in their complaint, unduly restricts the privilege. The sustaining of any claim of privilege invariably forecloses further inquiry into a factual situation which, in the absence of privilege, might well have warranted judicial relief. The reason why the law has nonetheless established categories of privilege has never been better set forth than in the opinion of Judge Learned Hand in *Gregoire v. Biddle*, CA2, 177 F. 2d 579:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the

answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

II

Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. See, e. g., *Marbury v. Madison*, 1 Cranch 137 (1803); *Youngstown Sheet and Tool Co. v. Sawyer*, 343 U. S. 579 (1952); *Kilbourn v. Thompson*, *supra*. But the prospect of the District Court enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

In *Mississippi v. Johnson*, 4 Wall. 475 (1886), an action was brought seeking to enjoin the President from executing a duly enacted statute on the ground that such executive action would be unconstitutional. The Court there expressed the view that I believe should control the availability of the injunctive relief here:

"The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.*, at 500.

In *Kilbourn v. Thompson*, *supra*, the Court reviewed the arrest and confinement of a private citizen by the Sergeant-at-Arms of the House of Representatives. In *Watkins v. United States*, 354 U. S. 178 (1957), the Court reviewed the scope of the investigatory powers of Congress when the executive had prosecuted a recalcitrant witness and sought a judicial forum for the purpose of imposing criminal sanctions on him. Neither of these cases comes close to having the mischievous possibilities of censorship being imposed by one branch of the Government upon the other as does this one.

In *New York Times v. United States*, 403 U. S. 713 (1971), this Court held that prior restraint comes before it bearing a heavy burden. *Id.*, at 714. Whatever may be the difference in the constitutional posture of the two situations, on the issue of injunctive relief, which is nothing if not a form of prior restraint, a Congressman should stand in no worse position in the federal courts than does a private publisher. Cf. *Hurd v. Hodge*, 334 U. S. 24, 34-35 (1948). Purely as a matter of regulating the exercise of federal equitable jurisdiction in the light of the principle of separation of powers, I would foreclose the availability of injunctive relief against these respondents.

SUPPLEMENTAL QUESTIONS SENT TO PARTICIPANTS IN THE ROUNDTABLE DISCUSSION
BY CHAIRMAN METCALF

CONGRESS OF THE UNITED STATES,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C., August 1, 1973.

Dear —: As I indicated in my letter to you of July 20th, 1973, I am enclosing additional questions on matters related to the committee's inquiry into legislative immunity, which time precluded our discussing at the roundtable meeting.

The completeness of the hearing record and, most importantly, the consideration by the committee of this issue in drafting our report and recommendations for the Congress will be facilitated by your discussion of the issues raised by these queries in as complete a manner as time and the demands of your personal schedule will permit.

I am not imposing any time schedule for your response, but the committee will, of course, appreciate a response at your earliest convenience. It is my intention to call a meeting of the committee for the purpose of initial discussion of our report and recommendations soon after the resumption of the congressional schedule in September.

Thank you for your interest and for your contribution to this inquiry by the committee.

Very truly yours,

LEE METCALF.

Enclosure.

QUESTIONS FOR PANEL OF WITNESS-EXPERTS ON LEGISLATIVE IMMUNITY

IMMUNITY IN CIVIL AND CRIMINAL PROCEEDINGS

The Supreme Court in the *McMillan* case appears to have exercised jurisdiction over the content of an official publication of the Congress. The Court is telling the Congress what it can and cannot include in a report of a congressional committee, to whom that report can be made available, and by whom.

The bill introduced by Senator Ervin in this Congress—S. 1314—and Title II of S. 1726, introduced by Senator Gravel, are limited to the immunity from inquiry of Members of Congress in criminal proceedings regarding defined legislative activities. [Copies of the bills are attached.]

1. Doesn't it appear that the legislative process is much more seriously disrupted by a court-ordered embargo on a report of a congressional committee—some two and a half years after it had been ordered printed and distributed by the House of Representatives—than by having an individual legislator charged with a violation of a criminal statute for what may be a legislative act?

2. Article I, section 6, of the Constitution provides freedom from inquiry "in any other Place" to legislators for their legislative acts. Is that immunity limited to criminal proceedings?

3. In the case of a private civil action, where a constitutionally-protected right of an individual has been alleged to have been infringed, is there (a) absolute immunity for legislative activities; (b) no immunity; or (c) a necessity that the freedom of speech or debate be "balanced" against the competing constitutional claim of the individual?

4. If you are of the opinion that there is at least some immunity for legislators from civil proceedings, how would you define that immunity for purposes of legislation by the Congress?

5. Should a recommendation for congressional action to define legislative acts—for which Members of Congress and those who assist members in performing such acts shall be free from inquiry in judicial proceedings—(a) be limited to civil proceedings; (b) be limited to criminal procedures; or (c) combine both in defining legislative immunity?

What is your reason for your choice?

REPRESENTATION OF CONGRESSIONAL INTERESTS IN COURT

In the *McMillan* case, the House District Committee was represented by the Justice Department, at the request of the committee, during the lower court proceedings. However, just as the case was moving up to the Supreme Court, the Justice Department withdrew because of the conflicting position it was taking on

Speech or Debate Clause immunity in the *Gravel* case. The Congress was represented in the Court by private counsel, with accompanying adverse publicity regarding costs involved and so forth.

Now, with the *McMillan* case on remand, the Congress finds itself in the position of having congressional interests once again represented by the Justice Department. The Government Printing Office defendants have requested such representation.

1. Shouldn't Congress give serious consideration to a better system of legal representation—particularly since it seems today that many legislative disputes—such as impoundment and war powers—are being settled in the courts?

2. What would you recommend to provide such representation?

3. Would you comment on the idea of a counsel for the Congress, similar to the proposal set out in Title III of Senator Gravel's bill, S. 1726?

4. [This quære is addressed to Ms. Lawton.]

What defines the attorney-client relationship between the Department and the Congress in an instance where a Member of Congress, congressional committee or other congressional party to an action has requested representation by the Department?

Are there departmental regulations, rules or other writing pertaining to the representation of a congressional "client?" If so, are copies available to the committee? Would you comment on the nature of this rather unique attorney-client relationship?

Is it the case that the congressional client must accede to the judgment of the Department in the handling of his legal action; e.g., how are decisions regarding the case made?

THE SCOPE OF IMMUNITY FOR LEGISLATIVE ACTS

A question presented to the Supreme Court in the *Gravel* case was, in the words of the brief for the United States:

Whether the Speech or Debate Clause of the Constitution (Art. I, Sec. 6) bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member that are protected "Speech or Debate."

Justice White, writing for the Court's majority, answered this question with this response:

We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself. [*Gravel v. United States*, 408 U.S. 606, 618 (1972)]

This conclusion was said not to be foreclosed by the holdings in *Kilbourn v. Thompson* [103 U.S. 168 (1881)], *Dombrowski v. Eastland* [387 U.S. 82 (1967)], and *Powell v. McCormack* [395 U.S. 486 (1969)]. Justice White stated, in that regard, that—

[n]one of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. . . .

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in *Eastland*, as in this case, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. . . . [408 U.S. at 620-21]

1. Is it your opinion that this reasoning by Justice White would lead to the conclusion that had a Member of Congress performed the acts complained of in the *Kilbourn*, *Dombrowski* and *Powell* cases—acts performed by congressional employees under congressional direction—the Court would have held the Member to be liable for that action?

2. If Members of Congress and congressional employees themselves publicly distribute the report in controversy in *McMillan*, would they share liability with the Government Printing Office defendants for that distribution?

CONSTITUTIONAL AUTHORITY TO DEFINE LEGISLATIVE ACTS

1. Is it necessary to equate "legislative acts" with the "Speech or Debate" language in Article I, section 6, to broaden the scope of legislative immunity by legislation?

2. To what language in the Constitution is the grant of legislative powers in Article I, section 1, and the necessary and proper clause of section 8 tied to afford Congress the authority to legislatively define its own immunity?

CONGRESSIONAL RESPONSIBILITY UNDER ARTICLE I, SECTION 5

1. Any congressional action to define a realistic scope for legislative activities, for which legislators and those acting on their behalf are to be immune from judicial proceedings, carries with it the responsibility to keep our own houses in order. Do you think the disciplining of Members can be fairly and equitably performed by the individual houses of Congress?

2. Two of the recent Supreme Court decisions interpreting the Speech or Debate Clause involved allegations of bribes to Members of Congress. The opinions—in the *Johnson* and *Brewster* cases—reserved for future consideration the question of a delegation by the Congress, in specific and narrowly defined terms, of our Article I, section 5, authority of disciplining our Members.

Do you think, first, that such a delegation would be constitutional, and, if it is constitutional, is it wise?

Would you suggest changes or additions to the existing congressional mechanisms for discipline?

JURISDICTION OF THE COURTS

Finally, the committee would appreciate receiving your comments on the following propositions:

1. Whenever it appears to the Court that the matter in controversy involves the propriety of the exercise of legislative power by the Congress or any of its components the court must dismiss the action for want of jurisdiction because the judicial review of decisions or actions in the legislative process would be tantamount to judicial exercise of legislative power, *all* of which is vested in the Congress, none in the courts.

Note: This proposition is not in conflict with the *Marbury v. Madison* holding that a statute (the end-product of the legislative process) which conflicts with the Constitution is void to the extent of the conflict.

2. The rules and precedents of the House and Senate are internal legislative procedural matters, normally enforced by points of order, and may not in a subsequent court action form the basis for a review of the propriety of actions and decisions in the course of the legislative process. The courts must give full faith and credit to the final judgment of the Senate, the House of Representatives and the Congress.

3. There is no way to avoid a threshold, jurisdictional determination by the court that the subject matter of the controversy involves review of the exercise of legislative power.

RESPONSES OF MS. LAWTON TO SUPPLEMENTAL QUESTIONS¹

DEPARTMENT OF JUSTICE,
Washington, D.C., August 17, 1973.

HON. LEE METCALF,
Chairman, Joint Committee on Congressional Operations, U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: Enclosed are my responses to the questions posed with your letter of August 1, 1973. As you will note, I have not felt free to respond to all of the questions raised. Unlike the distinguished professors, I participated in the panel as a representative of the Department of Justice, not

¹ None of the other participants in the roundtable discussion submitted responses to the supplemental questions.

as an independent "expert," and am therefore limited in my comments concerning pending cases in which the Department is involved, such as *Doe v. McMillan*. Nevertheless, I hope the attached is of some benefit to the Committee.

Respectfully,

MARY C. LAWTON,
Deputy Assistant Attorney General,
Office of Legal Counsel.

Enclosure.

IMMUNITY IN CIVIL AND CRIMINAL PROCEEDINGS

Before commenting on specific questions, it should be noted that the statement with respect to the holding in *Doe v. McMillan* is overly broad. The Court did not assert the power to censor official publications of the Congress. Indeed it held that no action would lie for official distribution of a report within the Congress. As to distribution outside the Congress the Court said that it had "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded." Accordingly it remanded this question to the court below.

1. While we are not aware of any court-ordered embargo on a report, it might be conceded that judicial action relating to the legislative function of the Congress has greater impact on the legislative institution than action which affects the personal conduct of an individual member. Of course, it must be noted that definitions of the "legislative function" vary.

2. Article I, section 6 does not distinguish between civil and criminal proceedings with respect to the "Speech or Debate Clause" although such a distinction is made with respect to arrest immunity. The distinction on which the cases rest is what is and is not a "legislative function" protected by the Clause.

3. The case law, to date, recognizes an absolute immunity of the legislator for legislative activities infringing the constitutional rights of individuals. *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); cf. *Tenney v. Brandhove*, 341 U.S. 367 (1951). Aides, however, do not share this absolute immunity. There is language in *Gravel v. United States*, 408 U.S. 606, 618-622, however, that casts some doubt on both propositions.

4. Legislators are not immune from civil proceedings, they must still respond to such proceedings and claim privilege where applicable.

5. No recommendation.

REPRESENTATION OF CONGRESSIONAL INTERESTS IN COURT

1. Representation of the Congress has normally been undertaken by the Department of Justice except in cases where there is a direct conflict or a purely internal legislative matter. The question, however, appears to posit something more than the defense of Congress when it is sued. What is contemplated is unclear.

2. See 1 above.

3. Title III of S. 1726 contemplates not only the defense of Congress by separate counsel but also initiation of civil litigation by the Congress and "intervention" before Grand Juries. These present different problems.

Congress can and has sought independent representation to defend itself in litigation when the Department of Justice has declined representation. It is certainly arguable that this could be done on a permanent basis.

Initiation of civil suits by the Congress is quite a different matter. The execution of the laws is a matter committed by the Constitution to the Executive Branch and cannot be usurped by the legislative branch. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). Generally the decision whether or not to initiate litigation on behalf of the United States is viewed as a distinctly executive power. *Parker v. Kennedy*, 212 F. Supp. 594, 595 (S.D.N.Y. 1963). It is questionable that Congress could constitutionally assume this power. See *United States v. Cox*, 342 F. 2d 167 (C.A. 5, 1965), cert. denied 381 U.S. 935 (1965).

The concept of "intervention" before a grand jury is unheard of in American jurisprudence, either on behalf of the Congress or any private person. Even persons under investigation are not permitted counsel in the Grand Jury room. Rule 6(d), Fed. Rules Crim. Proc. It would violate all of our traditions and almost certainly the Constitution to permit a legislative body to appear as some form of "third party" before a Grand Jury.

Thus, the concept of counsel expressed in Title III of S. 1726 poses several serious constitutional problems as well as policy questions.

4. There is no "definition" of attorney-client relationship between the Department of Justice and any branch, agency or official that it represents. The statutes authorizing the Attorney General to conduct and supervise litigation, *e.g.* 28 U.S.C. 516-519, 547, constitute the basic authority for representation. In addition, 2 U.S.C. 118 authorizes representation of persons sued on account of anything done "while an officer of either House of Congress in the discharge of his official duty" if such representation is requested.

The practices of the Department with respect to representation of Congress, its members or its officers are described in some detail in a letter dated March 14, 1973 from Deputy Assistant Attorney General Jaffe (Civil Division) to Staff Counsel Raymond Gooch. These practices have not been formalized as rules or regulations nor are we aware of any general "writing" pertaining to the representation of congressional clients as a group. Individual case files may contain discussions of representation in particular fact situations.

The representation of Congress, like the representation of judges may pose conflict situations. For example, the Department will represent a federal judge, on request, in a mandamus case but not, of course, if the Department itself is seeking mandamus. Similarly, the Department will not represent the Congress or a congressman on request if there is a potential conflict. Such conflicts can also arise, of course, within the Executive Branch itself where agency views and interests may differ. Where the Department undertakes representation, the "attorney-client relationship" is similar whether the client be an executive agency, the Congress or a federal judge. The uniqueness that exists is in the nature of government representation itself—*e.g.* government may confess error where private counsel could not—not in the nature of the particular "client."

When the Department undertakes representation of a congressional client it insists on retaining control of the litigation and making the litigative decisions. Conflicts of opinion are normally resolved by discussion; if they are not in a given case, private counsel is recommended. The decisions are made by the appropriate litigating division in the same manner as in all other cases—decision by counsel handling the litigation in consultation with the "client," with review by supervisors where appropriate. Decisions as to appeals are made by the Solicitor General after discussion with the litigating division.

THE SCOPE OF IMMUNITY FOR LEGISLATIVE ACTS

1. The situation posited is, of course, hypothetical and it would be inappropriate for a representative of the Department of Justice to suggest an answer. The time may come when the Department would be requested to represent a Member of Congress in such a situation and it would be undesirable to foreclose or prejudice argumentation by taking a position at this time.

2. Same comment as 1 above. It should also be noted that *McMillan* is still in litigation with the Department representing the Public Printer.

CONSTITUTIONAL AUTHORITY TO DEFINE LEGISLATIVE ACTS

1. The question appears to raise the issue whether the Speech or Debate Clause is the only possible source of legislative authority to enact immunity provisions relating to Congress. If this is the thrust then the answer must be that this is not the only source of legislative authority. Congress could, for example, place restrictions on the jurisdiction of the federal courts—particularly the lower federal courts—in such a manner as to foreclose particular actions against the Congress.

2. Unlike Article II which vests "The executive Power" and Article III which vests "The judicial Power," Article I contains a more limited agent—"All legislative Powers *herein* granted." On its face, "herein" might be read to refer only to Article I itself but it seems clear from reading the Constitution as a whole that "herein" means in this Constitution. Similarly, the Necessary and Proper Clause in Article I, section 8 would appear to apply to all of the powers vested in the Congress.

These powers could relate to the legislating of immunity in a number of ways. As mentioned above, jurisdiction of the federal courts could be circumscribed. Offenses such as bribery and conflict of interest could possibly be defined to ex-

clude members from liability. The authority to legislate for the District of Columbia might be utilized to exempt Members of Congress from all laws in the District, etc. As a technical matter, several variations could be used. The wisdom of using them is, of course, a separate matter.

CONGRESSIONAL RESPONSIBILITY UNDER ARTICLE I, SECTION 5

1. There are serious and possibly even overwhelming difficulties in self-disciplining by the Congress. As a political matter it would be extremely difficult for members to act against a colleague whose support they may need for some legislative matter. At the same time, it might be far too easy to abuse the discipline function with respect to the "maverick" member who, for example, continually criticizes the operations of the Congress.

Aside from political difficulties, members simply do not have the time to devote to a discipline system which would encompass the necessary investigation and hearing to assure fairness. Such proceedings can be extremely time-consuming. At present, Congress also lacks the staff necessary to conduct such investigations free from other duties.

2. As the Committee may be aware the question of delegating disciplinary authority over members of Congress was argued by the Department in the *Brewster* case. The arguments in support of such delegation are set forth in the government's brief. The wisdom of delegating is a matter on which we express no opinion.

JURISDICTION OF THE COURTS

1. While the general proposition stated is accurate in many, and perhaps most, instances of inquiry into the details of the legislative process, it is not universally true. In *Powell v. McCormack*, 395 U.S. 486, the Court held that it had jurisdiction to review the legislative act—exclusion—and pass on the merits even though the individual members could not be held liable. Similarly, the court would almost certainly review the legislative action in a contempt enforcement proceeding or a habeas corpus action based on summary contempt. Cf. *Kilbourn v. Thompson*, 103 U.S. 168. The immunity of the legislator is not an automatic bar to the review of the "propriety of the exercise of legislative powers."

2. Again the proposition is not universally true. For example, lack of committee jurisdiction under the standing rules may be raised and considered as a defense in a contempt of Congress prosecution. It might be noted, in addition, that the "full faith and credit" language of Article IV relates to State recognition of the acts of other States, not to judicial recognition of legislative precedents.

3. The statement is accurate inasmuch as the courts themselves must decide whether they have jurisdiction.



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